153-57

SUPREME COURT OF THE [illegible]

OCTOBER [illegible]

No. [illegible]

MARY P. GREELEY, EXECUTRIX [illegible]
DECEASED, [illegible]

vs.

R. H. LOVE [illegible]

APPEAL FROM THE SUPREME COURT OF [illegible]
THE NORTHERN [illegible]

FILED MARCH [illegible]

(15,2[illegible])

(15,285.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 910.

MARY P. GREELEY, EXECUTRIX OF GEORGE P. GREELEY, DECEASED, APPELLANT,

vs.

R. H. LOWE ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

INDEX.

	Page.
Bill of complaint	1
Affidavit for service by publication	33
Order of publication	34
Proof of publication	36
Motion of Christiana Williams to discharge service	36
Plea of Isaac A. Stewart	37
Demurrer of George Bennet *et al*	40
Motion for leave to amend bill	41
Motion of Arthur G. Hamlin *et al.* to dismiss	42
Final decree, April 12, 1892	43
Petition for rehearing	44
Order setting aside decree and granting rehearing	46
Amendment to bill of complaint	46
Will of Duncan L. Clinch	49
Order fixing the amount of the appeal bond, &c	52
Order allowing appeal	53
Appeal bond	53
Assignment of errors	55
Clerk's certificate	56
Motion to discharge service on McRae *et ux*	57

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 27, 1894.

	Print.
Demurrer of Arthur G. Hamlin *et al*	57
Demurrer of Thomas J. Smith *et al*	60
Plea of David B. Parce	63
Demurrer of Mary Susan Hodges	65
Plea of Shepard J. Hodges	67
Motion to quash by Harwood Land and Improvement Co	72
Subpœna to Goodrich *et al*	72
Motion to discharge service on Davis *et al*	73
Order setting demurrers, &c., for hearing	74
Stipulation to omit certain papers from transcript	75
Clerk's certificate	75
Order of revivor	76
Bond for appeal	76
Appeal and assignment of errors	78
Order allowing appeal	78
Order on suggestion of death of McRae *et al*	79
Citation to Lowe *et al*	79
Bill of revivor	80
Appearance for certain defendants	83
Citation to Stewart *et al*	83
Appearance for McRae *et al*	85
Appeal and allowance of same	86
Citation	87
Proof of service of citation	87
Order of revivor	88
Assignment of errors	89
Clerk's certificate	89
Stipulation in regard to record	91
Certificate of questions at issue, &c	91

CIRCUIT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF FLORIDA, IN CHANCERY.

GEORGE P. GREELEY, et al,
vs.
RICHARD H. LOWE, et al.
} Bill of Complaint for the Partition of Real Estate.

TO THE HONORABLE THE JUDGES OF SAID COURT:

I

The complainants George P. Greeley and Mary P. Greeley, his wife, say they are citizens of New Hampshire and reside in Nashua in said state, and bring this bill against the defendants, who are all citizens and residents of other states, to-wit: Alexander St. Clair Abrams and Joanna Abrams his wife, citizens of Florida, residents of Tavares.

Philemon N. Bryan and Lucy Bryan his wife, Joseph D. Bryan, Jr., and Martha Bryan his wife, George Bennett and Polly his wife, Marian Bennett a minor of over fifteen years of age, Anna Caven in her own right and as administratrix of the estate of W. H. Caven deceased, Albert S. Goodrich, Charles W. Goodrich and Hester Goodrich his wife, W. A. Goodrich, H. M. Goodrich, A. S. Goodrich and Annie Goodrich his wife, Frances R. Goodrich, Elizabeth Goodrich. Georgiana Bryan, Henry Guller and Anna Guller his wife, Shepherd J. Hodges and Mary Susan Hodges his wife, Robert S. Nelson and Harriet Nelson his wife, Isaac A. Stewart and Kate B. Stewart his wife, Arthur G. Hamlin and Ella P. Hamlin his wife, David B. Parce and Maria Parce his wife, and Henderson Williams are all citizens of Florida, residents of Volusia County.

William R. Bush and Charles R. King are citizens of Florida, residents of Columbia County.

Walter A. Drake is a citizen of Florida, resident of Sanderson in said State.

Hezekiah Foster and Sarah Foster minors, James M. Foster individually and as guardian of said minors, Mary F. Johns and Henry B. her husband, the said Mary believed to be a minor, and Philip E. Lowe and Virginia T. Lowe his wife, are citizens of Florida, residents of Suwannee County.

Thomas L. Smith and Bessie Smith his wife are citizens of Florida, residents of Hillsboro County.

Carrie E. Jackson and William F. Jackson her husband are citizens of Florida, residents of Gainesville; Henry Burke, Willis W. Burke, Jr., Mary Green and John Green her husband, are all citizens of Florida, residents of Hamilton County in said state.

Granville B. Burke is a citizen of Florida, resident of Fort Pierce in said state.

Edward E. Cleveland and The Harwood Land & Improvement Company a corporation under the laws of Florida, are citizens of Florida, residents of Jacksonville.

Charles L. Mitchell is a citizen of Florida, resident of Polk County.

Joseph Rosenheim as trustee of the creditors of W. C. Braddock, and J. Houston M. Clinch individually and as executor and trustee under the last will and testament of Duncan L. Clinch deceased, are citizens of Georgia, residents of Savannah.

Eliza B. Anderson is a citizen of Washington City, District of Columbia.

Duncan Clinch, Jr., George Clinch, Houston Clinch, Jr., are citizens of Georgia, residents at Brunswick. Bayard Clinch and Floyd Clinch are citizens of Illinois, residents at Chicago. H. E. Clinch is a citizen of Georgia, resident at Sparta. Mary L. Clinch, William Heyward, Clinch Heyward and Bayard Hayward are citizens of South Carolina, residents of Charleston.

The widow, and unknown heirs of G. W. Clinch deceased are citizens of Florida, place of residence unknown.

Sophia L. Davis, Nicholas Davis her husband, Susan R. Davis, Dewitt C. Davis her husband, Sarah Lowe, Lucy Lowe and Richard H. Lowe are citizens of Alabama, residents of Huntsville.

Robert J. Lowe is a citizen of Alabama, resident of Birmingham.

Ellie Lowe, Carrol Lowe, Manning Lowe, Fannie Lowe, Jr., Marie Lowe a minor eighteen (18) years of age, and Fannie Lowe individually and as guardian of said Minors are all citizens of Alabama, residents of Courtland in said state.

W. T. Purviance, Caroline A. Drake and —— Drake her husband, Margaret E. Gurganus and —— Gurganus her husband first names unknown, Maria Makepeace and George H. Makepeace her husband, Margaret H. Markham and F. E. Markham her husband, Mary C. Rotha and R. S. Rotha her husband are citizens and residents of Texas; Colin McRae, Annie McRae his wife, Donald L. McRae, Nancy his wife, Kate A. Vink —— Vink her husband, Annie P. Aldeman, Wm. Aldeman her husband, John McRea, Jas. D. McRae, Wm. W. McRae, Roderick McRae, Mary A. Grace and B. F. Grace her husband, Sallie McRae Chater, R. Dundas Chater her husband, and Geo. McRae are citizens and residents of North Carolina.

Donald McRae and Nancy McRae his wife, citizens of North Carolina, residents of Wilmington.

Mary G. Van Vorst and Frederick B. Van Vorst her husband are citizens of New York, residents of Newark. Sallie McRae, Caroline D.

McRae of full age, George U. McRae eighteen years old, Frederick D. McRae fifteen years old, and Walter C. McRae thirteen years old, all minors, are citizens of New Jersey, residents of Bergen County.

Christiana Williams and Jackson Williams the latter a minor, are citizens of Mississippi, residents of said state, postoffice address unknown.

Alexander Purviance a minor, Gerald Purviance a minor, over eighteen years old, are citizens of Texas, residents of Wharton in said state.

Certain unknown heirs of Alexander, John and Archibald McRae deceased, citizens of North Carolina and Texas, post offices unknown.

II

The complainant George P. Greeley says he is seized as tenant in common of an estate in fee simple and is in actual possession of the following described real estate in Volusia County, Florida, and in this Judicial District, to-wit:

Section forty-six (46), township eighteen (18) south, range thirty-four (34) east, containing nine hundred and ninety-four (994) acres, and section forty-seven (47) of the same township and range, containing eight hundred and fifty-nine (859) acres, and section thirty-eight (38), township nineteen (19) south, range thirty-four (34) east, containing five hundred and ten (510) acres, and section thirty-nine (39) of the same township and range, containing seven thousand, five hundred and twenty-eight (7,528) acres, and section forty (40) of the same township and range, containing one hundred and twenty-five (125) acres, and making a total of ten thousand and sixteen (10,016) acres, for a definite description of which by metes and bounds reference being had to the patent of the United States to John W. Lowe and the heirs and legal representatives of John Lowe deceased, dated June 30th, A. D. 1882 will fully and at large appear, and reference is hereby made thereto for certainty, the same being recorded in Liber 18 folios 89 etc. of Private Land Claims in the General Land office at Washington City, D. C., and that he is entitled to partition of said ten thousand and sixteen (10,016) acres which are of the value of over $10,000.00 exclusive of interest and costs.

III

That John Lowe (called also John T. Lowe) and Susan (called also Susanna Lowe) his wife were seized of said premises by grant from the Spanish government in 1816, as a mill right, he being then the head of a family, the said Susan Lowe being then his wife and seized by ganancial right of an undivided one-half of said premises, for that under the laws of Spain, then in full force in Florida, real estate acquired by either husband or wife during coverture by purchase, gift or gain became and remained community property and they were seized thereof as tenants in common; that said John T. Lowe departed this life in the year 1824

intestate, seized as aforesaid of said premises which were afterwards at the January term 1842, of the Supreme Court of the United States, confirmed as a valid and subsisting grant from His Spanish Majesty the King of Spain, to the said John T. Lowe as aforesaid as by reference to the records in said court in the case of the United States vs. John W. Lowe et al. will fully and largely appear; and the ganancial right and title of said Susan Lowe has never been alienated, relinquished or annulled, but the same has been duly protected and guaranteed by the Treaty of Amity, Settlements and Limits dated February 22nd, A. D. 1819, between the United States and Spain as by reference to Article VIII and other articles of Said Treaty and the Statute of Florida enacted December 23rd, 1824, and recorded as Chapter 150 of McClellan's Digest and other Laws of Florida will fully and at large appear.

IV

That on or about February 1st, 1821 the said John T. Lowe, then in being attempted to convey to George J. F. Clark the Southern half of said premises by deed recorded long afterwards, to-wit: July 24th, 1873 in Book B. page of the Records of Volusia County, Florida; that in fact and in law, there could not have been and was not conveyed more than an undivided one-half of the said Southern half of said premises, for that the said John T. Lowe was then seized of only the undivided half thereof, the other half being then vested in and seized by the said Susan Lowe his wife then in being, she not joining in said deed; that the said undivided half of the Southern half of said premises was afterwards conveyed by said G. J. F. Clark to Duncan L. Clinch by deed recorded July 24th, 1873 in said book B. page 9; that said Duncan L. Clinch died prior to March 21st, 1850 testate, on which date his last will and testament was probated by the terms whereof the interest of said testator became vested in J. Houston M. Clinch his executor, and as his trustee who is a defendant, and who is entitled with the other devises of said D. L. Clinch on partition to the one-half of the South half of said premises or to the proceeds of the sale thereof. Certified copies of said deeds are herewith filed marked Exhibits B. and which left remaining vested in the said John T. Lowe and Susan Lowe the North half of said grant and in the said Susan Lowe the undivided one-half of the South half thereof by ganancial right as aforesaid.

The remaining devisees of said D. L. Clinch deceased and their heirs, who are co-parceners with said J. H. M. Clinch, are made parties hereto and are as follows:

1ST. Eliza B. Anderson a daughter.

2ND. The children of Duncan L. Clinch, Jr., deceased, to-wit

1ST. Duncan Clinch.
2ND. George Clinch.
3RD. Houston Clinch, Jr.
4TH. Bayard Clinch.
5TH. Floyd Clinch.

3RD. The children and husband of C. H. Clinch who married Wm. Heyward, and deceased, to-wit:

Wm. Heyward who takes a child's share, Clinch Heyward, Bayard Heyward.

4TH. N. A. Clinch.

5TH, Mary L. Clinch.

6TH. The unknown widow and heirs of G. W. Clinch deceased, who resides in Florida.

N. B. Clinch another son and devisee of said D. L. Clinch deceased about the year 1889 intestate, without issue and George died, the former unmarried, many years ago, and their interest in said grant passed to their brothers and sisters and their heirs. Each of the devisees above named or their heirs as stated are entitled to the one-fifth of the South half of sa d grant, to be sub-divided as their interests appear.

V

That the said Susan Lowe survived the said John T. Lowe; that his estate has long since been settled up, and all debts and expenses paid, and no necessity for administration has existed for many years and none has in fact been carried on; that said Susan Lowe departed this life in the year 1850 intestate, leaving no known debts and no necessity for an administrator, and none has in fact been appointed or if appointed he is long since dead and no record has been found concerning such administration.

VI

That the estate in said premises so seized by the said John T. Lowe and Susan Lowe, to-wit:

The North half of said grant and the undivided one-half of the South half thereof, descended to the following children and heirs of their body:

BARTLEY M. LOWE,	ALICE LOWE,	ELLEN LOWE,
FERNANDO LOWE,	REBECCA LOWE,	JOHN W. LOWE,
THOMAS LOWE,	FRANCES LOWE,	ELIZA LOWE,

and the heirs of Horatio Lowe as hereinafter mentioned, for that the said Horatio died before his said father and mother.

VII.

The said John W. Lowe died intestate and unmarried A. D. 1850; and the said Thomas Lowe who was also unmarried and Frances Lowe, who intermarried with one Suwarree who is also deceased, and Rebecca Lowe who intermarried with William M. Reed also deceased, have all long since deceased without issue intestate, leaving the surviving heirs of John T. Lowe and Susan Lowe seized by descent of their several estates of inheritance in said premises as tenants in common; and the estates of said John W., Thomas, Frances and Rebecca have long since been settled up and no debts are known to exist against them or either of them, and that the heirs of the body of said John T. Lowe and Susan Lowe deceased who inherited the community interest of their ancestors in person and by direct lineal descent, from the above named decedents, were included in six families, and that each of them inherited the one-sixth of said premises, to-wit:

1 Bartley M. Lowe.
2 Ellen Miller.
3 The heirs of Horatio Lowe.
4 Fernando Lowe.
5 Eliza Smith.
6 Alice A. Dell.

except as to the portion of said premises alienated by said John T. Lowe prior to his decease, as hereinbefore mentioned, which being deducted left to each stock one-eighth of the entire grant.

VIII.

The said Ellen Lowe married William Mickler who died A. D. 1835, and she again married George Miller about A. D. 1837, who deceased September 2nd, A. D. 1886, she surviving, and on or about January 3rd, A. D. 1890, she conveyed all her right, title and interest in and to said lands to-wit, one sixth of the North half and one twelfth of the South half thereof to Clarence W. Balis bachelor defendant, by deed recorded in Deed Book 2 page 190 of the Records of Volusia County, Florida, who now owns and is entitled on partition to the same to-wit: the one eighth [1/8] of all said lands or of the proceeds of sale thereof.

IX.

The said Bartley M. Lowe died in the year 1867 intestate, leaving heirs of his body as follows:

1 Robert J. Lowe, Jr. and Richard H. Lowe children of Robert J. Lowe, Sen. who was a son of said Bartley, the said Robert J. Lowe, Sen. having deceased prior to his father, his widow being entitled to neither dower, nor to any interest as devisee under the last will and testament of her said husband for that he was never seized of an estate of inheritance in said premises.

2 B. M. Lowe, Jr. who died intestate in the year 1883 leaving as his widow Fannie Lowe and the following children heirs at law:

1 Carroll Lowe.
2 Ellen Lowe.
3 Manning Lowe.
4 Fannie Lowe, Jr.
5 Marie Lowe, a minor eighteen years of age.

3 Lucy Lowe.
4 Susan R. Lowe who married Dewitt C. Davis defendant.
5 Sophia Lowe who married Nicholas Davis defendant.
6 Sarah Lowe.

The other children and heirs of B. M. Lowe, Sen. were Ellen V. Lowe, William M. Lowe, James Lowe and John T. Lowe, Jr. who have all deceased unmarried intestate, leaving their nephews, brothers and sisters defendants above named, their heirs at law, and who take their several shares as such in said lands.

The shares of the present surviving heirs of said B. H. Lowe, Sen. deceased are as follows:

1 Robert J. Lowe, Jr. and Richard H. Lowe are each entitled to the one ninety-sixth [1-96] of all said lands, or to the proceeds of the sale thereof, or to the one forty-eighth [1-48] thereof jointly.

2 Carroll Lowe, Ellie Lowe, Manning Lowe, Fannie Lowe, Jr. and Marie Lowe are entitled to the one forty-eighth [1-48] thereof jointly, or to the one two hundred and fortieth [1-240] in severalty, or to the proceeds of sale thereof, subject to the dower of Fannie Lowe widow, she being now ——years of age.

3. Lucy Lowe is entitled to one forty-eighth [1-48) thereof.
4. Susan Davis to one forty-eighth [1-48).
5. Sophia Davis to one forty-eighth [1-48].
6. Susan Lowe to one forty-eighth [1-48].

X.

The said Fernando Lowe died in February, 1841 intestate, leaving a widow, Elizabeth Lowe, who married again John J. Taylor since deceased, and the following heirs at law:

1. Philip E. Lowe, son, defendant.
2. Mary J. Lowe daughter, who married Jasper H. Ivey.
3. Elizabeth Taylor, widow who is entitled to a child's share in fee simple, as she so elected, now surviving,

The said Elizabeth Taylor as widow and heir at law of said F. Lowe deceased, chose a child's part in said premises, to-wit: one twenty-fourth 1-24 , by the knowledge and consent of her said son and daughter, and she together with said daughter Mary J. Ivey, her said husband Jasper N. Ivey joining her, who also inherited one twenty-

fourth 1-24 and conveyed their two twenty-fourths 2-24 or one-twelfth 1-12 of said premises June 14th, 1888 by deed recorded in Deed Book 8 page 85 of said Volusia County, Records, to George P. Greeley complainant and Samuel C. Warner defendant as tenants in common who are now owners and holders of one-twelfth 1-12 thereof and are each entitled to one twenty-fourth 1-24 of said premises on partition or to the proceeds of the sale thereof, and said Philip E. Lowe is entitled to a like one twenty-fourth 1-24 subject to dower of Virginia T. Lowe his wife, 47 years old. The said Elizabeth Taylor is still in being.

XI.

The said Horatio Lowe died intestate prior to the death of said John T. Lowe his ancestor, leaving the following children heirs at law:

1. Eliza Lowe married Lewis H. Bryan; she deceased intestate, leaving:

1. Lewis H. Bryan her husband who took a child's share, one-eightieth 1-80 until his decease in 1881, and the following children heirs at law:

2. Philemon N. Bryan one-eightieth 1-80 until 1881.

3. Gadsden D. Bryan one-eightieth 1-80 until 1881.

4. Joseph D. Bryan one-eightieth 1-80 until 1881.

5. Susan Bryan who married George W. Bennett, she deceased intestate, leaving her only child Marian Bennett a minor over fifteen years of age, and George Bennett her heirs at law each entitled to one one-hundred and sixtieth 1-160 until 1881.

At the death of Lewis H. Bryan in 1881 the share of said lands so descended to him and remaining unsold descended to:

1. P. H. Bryan one sixty-fourth 1-64.

2. G. D. Bryan one sixty-fourth 1-64.

3. J. D. Bryan one sixty-fourth 1-64.

4. Marian and George Bennett one sixty-fourth 1-64.

2. Martha Lowe who married L. K. Mickler both deceased intestate, leaving the following children surviving:

1. Temperance Mickler one-eightieth 1-80.

2. William B. Mickler one-eightieth 1-80.

3. Salome S. Mickler one-eightieth 1-80.

4. Lawrence B. Mickler one-eightieth 1-80.

5. Mary Mickler who married Benj. F. Adams one eightieth 1-80.

The said Lewis H. Bryan by marital right held after the decease of his wife which occurred——the one-eightieth [1-80] of said premises, and during the life of said L. H. Bryan the said P. H. Bryan held one eightieth [1-80]; G. D. Bryan one eightieth [1-80]; J. D. Bryan one eightieth [1-80], and Susan Bennett one eightieth [1-80].

After the death of said L. H. Bryan on or about the———day of ———1881 the said P. N. Bryan held one sixty fourth 1-64; G. D. Bryan one sixty fourth 1-64; J. D. Bryan one sixty fourth 1-64; Susan Bennett one sixty fourth 1-64 ; and after the death of Susan Bennett on or about the———day of———the said George Bennett held one one-hundred and twenty-eighth 1-128 and Marion Bennett one one-hundred and twenty-etghth 1-128.

From such shares are to be deducted such lands as were duly conveyed if any by Eliza and Lewis H. Bryan; from the survivors of Lewis after his decease, such lands as he conveyed; from Marian Bennett and George W. Bennett such lands as Susan Bennett conveyed, all of which is hereinafter specifically set forth, explained and described.

The said P. N. Bryan sold and conveyed to said G. D. Bryan as hereinafter shown the undivided one ninety sixth 1-96 of said grant, being his entire interest then remaining in the North one half.

The said G. D. Bryan sold and conveyed his entire interest in the premises to said G. P. Greeley and S. C. Warner through E. H. Jones, as hereinafter set forth.

After making the proper deductions as hereinafter shown, there remains to be set off in severalty, or if sold to be paid the proceeds thereof, to the following defendants, the following portions of said lands:

Phil N. Bryan one one hundred and ninety seconds 1-92 less 15.62 acres, 36.23 acres.

J. D. Bryan one sixty fourth 1.64 less 15.62 acres equal to 140.88 acres.

Marian Bennett one sixty fourth 1.64 less 15.62 acres equal to 140.88 acres.

XII.

The said Lawrence B. Mickler, Temperance A. Mickler, William B. Mickler, Salome Mickler, Mary Adams and B. F. Adams her husband, by deed duly executed June 14th, 1888 and recorded June 29th, 1888 in Deed Book 8 page 82 of said Volusia County Records, conveyed all their rights, title and interest in and to said grant, being an undivided one sixteenth 1-16 thereof, to George P. Greeley and Samuel C. Warner as tenants in common, who are now the owners and holders thereof, and they are now entitled on partition there, to wit:

G. P. Greeley one thirty second 1-32 as aforesaid; to S. C. Warner one thirty second 1-32 as aforesaid.

XIII.

The said Eliza Lowe marrie A. B. Smith who is deceased, and she also, intestate, leaving the following children their heirs:

1. Hezekiah Smith.

2. Sarah S. Smith who married L. S. Prevatt who died A. D.—— she surviving.

3. Charlotte Smith who married J. Poucher who died A. D.—— she surviving.

4. Mary Smith who married James M. Foster, she died intestate, no administrator having been appointed, he surviving, and the following children heirs at law:

1. Milton Foster.

2. Tison Foster.

3. Mary Foster who married Henry Johns, she supposed to be a minor.

4. Sarah Foster a minor over fifteen years of age.

5. Hezekiah Foster a minor over fifteen years of age, James M. Foster their father being their guardian.

6. James M. Foster who is entitled to a child's share.

5. Ellen Smith who married William Gay now dead, she surviving

6. Jane A. Smith who married Henry Clarke.

7. T. J. Smith now deceased, intestate, leaving now his sole surviving heir at law, Thomas J. Smith his son, A. I. Smith another son having died unmarried intestate, without administration upon either the father's or deceased son's estate.

A. The said Mary Johns, Sarah Foster and Hezekiah Foster, minors, inherited and are each entitled on partition to one three hundred and thirty-six (1-336) of said premises, or to the proceeds of the sale thereof, in all to three three hundred and thirty-sixths (3-336).

B. The said Tison Foster, Milton Foster and James M. Foster inherited each one three hundred and thirty-sixths (1-336) in all one one hundred and twelfth (1-112) and conveyed the same as hereinafter set forth to G. P. Greeley and S. C. Warner who are entitled on partition to said one one hundred and twelfth [1-112] and each entitled to one two hundred and twenty-fourths [1-224] of the said lands or proceeds of sale..

C. The said Hez. Smith, Sarah S. P. Prevatt, Charlotte Poucher, Ellen Gay and Jane A. Clarke [her husband Henry Clarke joining] conveyed each the one fifty-sixth 1-56 interest which they inherited to G. P. Greeley and S. C. Warner, in all five fifty-sixths [5-56] and the said G. P. Greeley is entitled on partition to five one hundred and twelfths 1-112 of said premises [or to the proceeds of sale] and the said S. C. Warner to five one hundred and twelfths 5-112 as above set forth.

The said T. J. Smith Jr. inherited one fifty-sixth 1-56 of said premises being the entire share of his father, after the decease of said A. I. Smith, and is entitled on partition to said one fifty-six 1-56 or the proceeds of sale thereof, subject to the dower of Bessie his wife——years old.

XIV.

The said Alice Lowe, daughter of John T. Lowe, married James Dell both deceased intestate, leaving the following children their only heirs at law:

1. Ann L. Dell who married J. E. Dodd.

2. Martha M. Dell who married Wallace McCall he deceased, she surviving.

The said Ann L. Dodd inherited the one sixteenth 1-16 of said premises.

The said Martha M. McCall inherited the one sixteenth 1-16. They conveyed the said one-eighth 1-8 so inherited, to G. P. Greeley and S. C. Warner as tenants in common, as hereinafter set forth, and the said G. P. Greeley is entitled on partition to one-sixteenth 1-16 or the proceeds of sale; and the said S. C. Warner to a like one-sixteenth 1-16 as aforesaid.

XV.

The said P. N. Bryan June 1st, 1883 conveyed by deed recorded June 18th, 1883 Book M. page 536 of said Volusia County Records, to said G. D, Bryan, all his interest in the North half of said grant, being the one forty-eighth 1-48 of the North half or one ninety-sixth 1-96 of the whole, less the unsold portion, if any, as herein mentioned and shown.

The said P. N. Bryan after said June 1st, 1883 was entitled to one forty-eighth 1-48 of the one half of the South half, equals one one hundred and ninety-seconds 1-192 of the whole, less his share of lands sold to S. J. Hodges, being as complainant believes and so avers one-fourth ¼ of 62.50 acres or one one hundred and ninety-seconds 1-192 less 15.625 acres, being practically and substantially 52.16 acres less 15.62 acres, equal to 36.54 acres or the proceeds thereof to P. N. Bryan on partition.

XVI.

The said G. D. Bryan after said June 1st, 1883 was entitled to said one forty-eight 1-48 of the North half or one ninety-sixth 1-96 of the whole of said premises from said P. N. Bryrn and one sixty-fourth 1-64 he inherited, equals five one hundred and ninety-seconds 5-192 of the grant and the 36.87 acres obtained from Hodges as shown in section XXXVI herein, less the parts sold, to-wit: one sixty-fourth of fifty acres conveyed to Alexander St. Clair Abrams, or .78 of an acre; 15.62 acres to S. J. Hodges: 1.04 acres to D. B. Parce——total 17.44 acres, being as complainant believes and so avers practically and substantially 287.70 acres remaining in said G. D. Bryan after June 1st, 1883, which

he conveyed to said Greeley and Warner as herein shown, through E. H. Jones, and the said G. P. Greeley is entitled on partition or distribution to 143.85 acres thereof; and said S. C. Warner to 143.85 acres thereof or the proceeds of sale thereof.

XVII.

The said Hezekiah Smith, Sarah S. P. Prevatt. Charlotte Poucher, Ellen Gay and Jane A. Clarke her husband joining as aforesaid, conveyed all their interests, being five fifty-sixths 5-56 of said premises by good and sufficient deeds, to one Everett H. Jones, duly recorded in Deed Book 7 page 133 of said Volusia County Records: the said James M. Foster, Tison Foster and Milton Foster three of the six heirs of said Mary M. Foster deceased, conveyed all their interests being one one hundred and twelfth 1-112 of said premises, by good and sufficient deed, to said Everett H. Jones, duly recorded in said Deed Book 7 page 140; the said Ann L. Dodd and Jacob E. Dodd her husband, and Martha M. McCall widow, conveyed all their interests being one-eighth 1/8 of said lands, by good and sufficient deeds to said Everett H. Jones, duly recorded in said Deed Book 7 pages 143 and 139 respectively; and the said Gadsden D. Bryan conveyed all his interest by good and sufficient deed on the 14th of December A. D. 1887 to said Everett H. Jones, duly recorded in Deed Book 6 page 202 of the Records of said Volusia County, Florida, being about 287.70 acres.

All the lands so conveyed to said Everett H. Jones were purchased in trust for said G. P. Greeley and S. C. Warner, who paid the consideration for the same, and by an action in chancery begun May 25th, 1888 in this Court, being of competent jurisdiction, by the said G. P. Greeley and S. C. Warner against the said Everett H. Jones, such proceedings were had that said Everett H. Jones was duly served by publication, and on the 3rd day of July, 1889 the said Court having jurisdiction of the person and subject matter involved did by final decree adjudge that said Everett H. Jones did purchase said lands with the funds of said G. P. Greeley and S. C. Warner, and did hold the same in trust for them, and it was further ordered, adjudged and decreed that said Everett H. Jones convey the same to said George P. Greeley and Samuel C. Warner, and that in default thereof that said decree operate as such conveyance, and further that Philip Walter who was appointed Master pro hac vice, convey said premises and all of them so held by said Everett H. Jones, to said George P. Greeley and Samuel C. Warner, and in pursuance of said order and decree the said Philip Walter as such Master, did convey by good and sufficient deed all of said premises so held by said Everett H. Jones, to the said George P. Greeley and Samuel C. Warner, which said deed was duly executed, acknowledged, delivered and recorded in Deed Book 9, page 538 of the Records of said Volusia

County, Florida; and the said G. P. Greeley and S. C. Warner now own and hold all of the premises so held by the said Hezekiah Smith, Sarah S. P. Prevatt, Charlotte Poucher, Ellen Gay and Jane A. Clarke as if conveyed directly by them to the said Greeley and Warner.

Said deed of said Everett H. Jones by Philip Walter, Master, is herewith filed marked Exhibit "A."

XVIII.

The said G. P. Greeley is entitled on partition or distribution from:

Taylor and Ivey, see Sec. X 1-24.....	417.33	Ac.
The Micklers, see Sec. XII 1-32.....	313.00	"
Smith heirs, see Sec. XIII (c) 5-112.....	447.10	"
Dodd and McCall, see Sec. XIV 1-16.....	626.00	"
The Foster heirs, see Sec. XIII (b) 1-224.....	44.75	"
G. D. Bryan, see Sec. XVI 5-384	143.85	"
Total,.....	1,902.03	

subject to the dower of Mary P. Greeley his wife age 51 years.

The said S. C. Warner is entitled on partition or distribution to the same, to-wit: 1,992.03 acres subject to the dower of———Warner his wife age—— years.

XIX

Complainant further says that on June 20th, 1889 there was recorded in Book 9, page 437 of said records a paper writing purporting to convey by W. K. Turner, Sheriff of Volusia County, Florida, to Arthur Hamlin and Isaac A. Stewart "ALL the estate, right, title and interest which Everett H. Jones had on February 26th, 1889 or at any time afterwards, in the following lands, to-wit: 1,0016 acres known as the John Low Grant;" that said paper writing does not convey any interest in said lands to said Hamlin and Stewart; that on February 20th, 1889 or at any time afterwards, the said E. H. Jones had no estate, right, title or interest in said lands; that the only estate which the said E. H. Jones had in such lands at any time, was a trust estate as trustee in trust for the sole benefit, use and behoof of George P. Greeley and Samuel C. Warner, who had furnished all the funds with which the said Everett H. Jones had purchased any right, title or interest in said lands; that said E. H. Jones prior to February 26th, 1889 held a legal title temporarily in an undivided portion of said lands to convey the same on demand to said George P. Greeley and S. C. Warner; that an action in chancery had been begun by them against said E. H. Jones as pleaded herein, on the 25th day of May, 1888 in the Circuit Court of the United States, Northern District of Florida, a court of competent jurisdiction, and that the same was a *lis pendens* when the said paper writing was

written, and that a decree was entered thereon February 3rd, 1889 and the title of said E. H. Jones was then *res adjudicata* and forever afterwards; and on June 3rd, 1889 a final decree was rendered fully declaring and enforceing said trust and conveying all the right, title and interest and estate which said Everett H. Jones held May 25th, 1888 or at any time thereafter, in said lands, to said Greeley and Warner; and said action was a lis pendens when the action at law was begun on which said paper writing is supposed to be founded; and the said paper writing attempting to convey said lands as aforesaid to Hamlin & Stewart was made pendente lite and is null and void and complainants are entitled to have the same so construed and cancelled.

XX.

That on an unknown date there was improperly and illegally recorded in Book "D" page 19 of the Miscellaneous Records of Orange County, Florida, a paper writing said to have been written October 7th, 1836 by said Eleanor Mickler who is claimed to have been Ellen Lowe, purporting to quit claim to Archibald McRae a one-seventh (1-7) undivided interest in and to the following land, to-wit: "Lying in the aforesaid territory in Musketo County on Indian River, adjoining lands of John H. McIntosh and others, containing 10,000 acres." That said paper writing was never proven or ackowledged and the record thereof is void, and the said writing is not a deed and is no notice of conveyance, and is void for uncertainty for that there is no legal description of any land in the John T. Lowe Grant herein described. The heirs and grantees of said Archibald McRae are made parties hereto, for that they claim an interest in the John T. Lowe Grant. They are not and never have been in possession of said grant or any part thereof, and the complainant and real parties in interest are entitled to have said paper writing construed and canceled.

And complainant is informed, believes and so avers that said Ellen Miller as Eleanor Mickler, never signed said paper writing, and that the same is a forgery.

A certified copy of said paper is herewith filed marked Exhibit "C."

There is no such legal record for deeds as "Miscellaneous Records" in the State of Florida, and said paper writing has never been duly recorded.

XXI

That on June 28th, 1848 there was improperly and illegally recorded in Deed Book "D" page 20 of the Miscellaneous Records of Orange County, Florida, a paper writing purporting to have been written September 16th, 1842 by said Susan Lowe widow of said John T. Lowe,

purporting to convey by quit claim to Alexander and John McRae an undivided one-seventh (1-7) interest in and to the following described lands.

"10,000 acres of land situate and lying and being in the District of East Florida, formerly Musketo County now Leigh Reed County, adjoining lands of J. H. McIntosh and Sibbald's lands, and was granted to John T. Lowe by the Spanish Government and surveyed on the 6th day of April 1816 by Don George Clarke of the Province of East Florida."

That said paper writing was never proven or acknowledged and the record thereof is void and the land therein referred to but not deseribed, is located in Leigh Reed County, District of East Florida, and the said description thereof is void for uncertainty, for that there is no legal description thereof and the said paper writing is not a deed and is no notice of conveyance. The heirs and grantees of the heirs of said Alexander and John McRae are made parties hereto for that they claim an interest in said premises. They are not and never have been in possession of said grant or any part thereof, and the complainant and real parties in interest are entitled to have said paper writing construed and canceled.

A certified copy of said paper writing is herewith filed marked Exhibit "D."

There is no such legal record for deeds as "Miscellaneous Records" in the State of Florida, and said paper writing has never been duly recorded.

XXII

The said Alexander, Archibald and John McRae departed this life many years ago in North Carolina, the said Archibald without issue intestate, leaving as his heirs at law his brothers and sisters, to-wit: The said Alexander and John McRae and Isabella Jackson, Ann Purviance and Roderick McRae; that the said Alexander McRae died intestate, leaving Donald McRae who is made party hereto, and others, heirs at law, all of whom have conveyed their supposed interests in said lands to Donald McRae who claims twenty-three one hundred and fortieths (23-140); the said John McRae died intestate leaving heirs all of whom except Mary G. Van Vorst who is married to Frederick B. Van Vorst, Sallie McRae, Carolina D. McRae, Georgie U. McRae, Frederick McRae and Walter McRae, the last three minors all of whom are made parties, have conveyed their supposed interests in said lands to Walter A. Drake (who claims an undivided 23-280; the above named heirs who have not conveyed claim one fifty-sixth (1-56) interest in said grant;) and all the remaining said heirs are Alexander and Gerald Purviance, the latter a minor a Christina and Jackson Williams, the lat-

ter a minor and Samuel D. and William H. Purviance who claim jointly one one hundred and fortieth 1-140 of said grant, but complainant denies they have any interest in said grant for that their ancestors had none. They are made parties. They are not now and never were in possession and the grantors of complainant and all the heirs of John T. Lowe and Susan Lowe, as complainant is informed, believes and so avers, have always held adverse to them, the said John, Archibald and Alexander McRae their heirs and assigns, and do now so hold, but present the claims of all of the parties that partition or distribution may be made to such parties as are entitled thereto for that no remedy at law exists to determine the several rights and interests of the said parties and if they are not entitled to partition or distribution that the court may so hold and quiet the title in the parties who are duly seized in fee.

The following heirs of said Archibald, Alexander and John McRae deceased, are made parties that they may set up their claims if any they have, or be stopped from claiming any interest, to-wit:

W. T. Purviance, Carolina A. Drake and———Drake her husband Margaret F. Gurganus and———Gurganus her busband, first names unknown, Maria Makepeace and George H. Makepeace her husband, Margaret H. Markham and F. E. Markham her husband, Mary C. Rother and R. C. Rother her husband, Colin McRae and Annie McRae his wife, Donald L. McRae and Nancy McRae his wife, Kate A. Vink and——— Vink her husband, Annie P. Aldeman and William Aldeman her husband, John McRae, James D. McRae, William W. McRae, Roderick McRae, Mary A. Grace and B. F. Grace her husband, Sallie McRae Chater and R. Dundas Chater her husband, and George McRae.

XXIII.

That on the 10th day of March, 1873 there was improperly and illegally recorded in Deed Book "A" page 594 of the records of Volusia County, Florida, a paper writing purporting to have been written September 27th, 1855 by William Reed as administrator of John S. Lowe deceased, and pretending to convey to said Eliza Bryan the following described premises:

"All that tract known as the Lowe Grant and containing 10,000 acres more or less, lying on Mosquito Lagoon in Turnbull Swamp, starting at a certain cabbage palmetto tree between 40 and 50 yards from the head of Flounder Creeek, known as the headwaters of the Indian River, and lying in a Northern direction from said point as shown in the Spanish survey in public archives in St. Augustine granted to said John S. Lowe by treaty of amity between the United States and his Catholic Majesty, King of Spain and confirmed to said John S. Lowe by the United States.

That said paper writing was made without authority was not proven or acknowledged as required by law, and was not attested except by one witness, was illegally recorded and is not a deed, is no notice of conveyance, and is absolutely null and void as a conveyance, and the complainant herewith files the same marked Exhibit "E" and asks that it be construed and canceled.

Complainant says that the interests of the he rs of said Eliza Bryan are as herein before set forth, and no additional interest was conferred by said deed.

XXIV.

That on March 22nd, 1882 there was illegally recorded in Deed Book "K" page 346 of said records, and a paper writing purporting to have been signed by said Hezekiah Smith, A. L. Smith, T. J. Smith, Charlotte Poucher, S. S. Prevatt, Ellen Gay, Jane A. Clarke, James Foster, T. A. Mickler, Salome Mickler, Mary M. Adams, L. B. Mickler, P. E. Lowe, M. J. McLaurin and W. B. Mickler, on March 8th, 1882, and to confer power of attorney upon Charles R. King and W. R. Bush and to agree to make a deed to one-half interest in said grant, upon recovery of same by said King and Bush; that said paper writing was not executed by said Charlotte Poucher, Sarah S. Prevatt, Ellen Gay, James M. Foster, Jane A. Clarke, T. A. Mickler, Salome Mickler, Mary M. Adams and L. B. Mickler and M. J. McLaurin nor by any person by them or either of them lawfully authorized; that the said Charlotte Poucher, Sarah S. P. Prevatt, Ellen Gay, Jane A. Clarke, Mary M. Adams and Mary Jane McLaurin were then and there under disability of coverture and their husband then l ving did not join in the execution of said paper writing, and as to them the same is ultra vires and void, and the said Charlotte Poucher, Sarah S. P. Prevatt, Mary M. Adams and M. J. McLaurin have not their legal names affixed to said document and the signatures thereto as to them are null and void. And the said Hezekiah Smith nowhere unites in the grant of said power, nor as a party to said so-called agreements; and the said supposed grantors of said power of attorney have not had their supposed and pretended signatures thereto duly attested, for that the attesting witnesses thereto do not pretend to attest all the signatures and do not designate such as they pretend to attest to, and said document does not confer any power or authority, right, title or interest upon or in said King and Bush defendants affect ng the title of said pretended grantors and is not a deed, was illegally acknowledged and illegally recorded as to said supposed grantors, is null and void and should be so construed and cancelled.

A certified copy is herewith filed, marked Exhibit "F". A certified copy of the revocation of Phil. E. Lowe of said power of attorney

is herewith filed, marked Exhibit "F. F." the same being duly recorded in the Chancery Records of Volusia County, Vol. 8, page 192.

XXV.

That on August 22nd, 1882 there was illegally recorded in Deed Book "K" page 344 of said records a paper writing purporting to have been signed by said Ellen Miller and George Miller her husband, on February 17th, 1882 and to confer power of attorney upon Charles R. King and W. R. Bush, and to agree to convey one-half interest of said Ellen Miller in said grant, upon recovery of the same by the said King & Bush; that said paper writing was not executed by said Ellen Miller she was not examined separate and apart from her said husband and did not acknowledge the same according to law, and she did not confer any power or authority, right, title or interest whatever, upon said King & Bush affecting the title of said lands then in said Ellen Miller, and the said paper writing as a power of attorney and as an agreement affecting the realty, is null and void, and is not a deed, was illegally acknowledged and illegally recorded, and should be so construed and canceled.

A certified copy of said paper writing is made part hereof marked Exhibit "G".

XXVI.

That the contract above referred to in paragraphs 24 and 25 has long since been abandoned and rescinded by all the parties, and has been actually annulled and revoked by deeds duly executed as herein referred to, and all right and interest in said lands has long since been forfeited by laches and neglect on the part of said King & Bush, and by failure of all consideration on their part to be paid and performed.

That on October 24th, 1887 there was recorded in Miscellaneous Book "I" page 33 of said records, a power of attorney duly executed by said Ellen Miller to one C. H. Tedder to demand, receive, take hold and recover of and from said King & Bush and all other persons, all title, deeds, powers of attorney and all other matters made by said Ellen Miller, referring to any and all her interests in and to said grant, and revoking all and every former power of attorney or consent heretofore made or agreed to by her the said Ellen Miller.

A certified copy of said cancellation of said power of attorney is herewith filed marked Exhibit "H".

That the said George Miller her husband, was then dead and she being then a feme sole did cancel and annual the pretended power of attorney and paper writing set up and pleaded in the foregoing paragraph, and the same was thereby annulled and rescinded, and the said King & Bush have not recovered said lands nor fulfilled their cove-

nant and agreement in said paper writing set forth and have no interest whatever in said lands; and the said Clarence W. Balis defendant, is the innocent holder and owner without notice as purchaser for value of all the right, title and interest of the said Ellen Miller to-wit:

The one-sixth 1-6 interest on partition of North half of said grant of 10,016 acres of land and one 1-12 of South half, to-wit: One-eight 1-8 of all.

XXVII.

The said Eliza and Lewis H. Bryan on the 1st of March, 1869 by a paper writing recorded December 14, 1869 in Book "A" page 28 of said records did attempt to convey to Willis W. Burke 2,500 acres of said grant and described therein as follows:

"2,450 acres in and being so much of the grant known as the Lowe Grant, to be taken on the extreme South boundary of said grant of such width only as will make that amount of land running clean through said grant from East to West and bounded entirely on the South line to form a compact body to be governed by legal "surveigh" when surveyed, and 50 acres to include a certain wild orange grove with a few chiny trees, known as Chiny Grove and Piny Land settlement, making in all 2,500 acres, the above 50 acres being on a different portion of the grant, but known as Burke's reserve, but neither of which is to interfere with one reserve supposed to be in section 47 being the largest and heaviest orange grove on said grant, and known as Bryan's reserve, nor to interfer with any of the lands pine or hammock, to Northward of said grove."

That one twenty-fourth 1-24 only of said premises were the separate estate of said Eliza Bryan and she did not acknowledge said deed, nor is your complainant able to locate said supposed premises by said description and he does aver that said conveyance is void for uncertainty of description. The said W. W. Burke is deceased intestate, leaving the following children heirs at law:

Carrie E. who married Wm. F. Jackson, Henry Burke, Willis W. Burke, Jr., Mary who married John Green and Granville B. Burke, who are made parties.

Said deed is herewith filed marked Exhibit "I".

XXVIII.

That on May 24th, 1875 there was illegally recorded in Deed Book "B" page 427 of said records a paper writing purporting to have been written March 26th 1875, and to convey by said Lewis H. Bryan to Charles Goodrich 100 acres of said grant, which said writing was not sealed as required by law, and is not attested except by one witness only, and was not duly acknowledged according to law, and the said paper writing is not a deed and the record thereof is void, and the

same should be so construed and canceled, and the same is made Exhibit "J" hereto by certified copy.

The said Charles Goodrich is deceased, leaving W. A. Goodrich, N. M. Goodrich, A. O. Goodrich, Francis R. Goodrich, Elizabeth Goodrich and Georgianna Bryan, a widow, his heirs at law who are made parties hereto.

There should be no more conveyed by said paper writing then one-sixtieth 1-60 of said 100 acres, to-wit: one and two-thirds 1-2-3 acres thereof.

XXIX.

The said P. N. Bryan on August 14th, 1883 by a paper writing recorded September 25th, 1884 in Deed Book "T" page 40 of said records, did attempt to convey to Albert S. Goodrich 40 acres in said grant and described as follows:

"Commencing at the South East corner of the North half of the Lowe Grant, running North on the grant line 440 yards to post marked "A"; thence West 11 degrees South 440 yards; thence North 11 degrees East 44 yards; thence East 11 degrees North 440 yards; South 11 degrees East 440 yards to place of beginning, in township 19, section 1, Range 34, containing forty (40) acres."

The said grantor had only one twenty-fourth (1-24th) interest in said premises, if there are such premises, but the complainant avers that said deed is void for uncertainty of description. The said Albert S. Goodrich is made a party hereto that he may set up and prove his claim if he can, and this complainant says that he has no interest whatever in said grant.

A certified copy of said deed is herewith filed, marked Exhibit "K."

XXX.

That said Gadsden D. Bryan, on the 25th day of May, 1881, by a paper writing recorded July 5th, 1881, recorded in Deed Book "H," page 293 of the records of Volusia county, Florida, did attempt to convey to one James A. Braddock 1600 (not 1700 as recited) acres of said grant and described in said writing as follows:

"500 acres in the North East quarter of the Lowe Grant, and bounded on the East by James Wilson, on South by Hodges, on North by Bennett and Cunningham, and on the West by Bryan.

2d. Also 1,100 acres lying due West of above described tract and adjoining and being portion of the North East one quarter and portion of the North West one quarter and also bounded on South by Hodges and North by Sibbald on West by Bryan. Constitutihg an aggregate area of 1,760 acres partly in township 18 and partly in township 19 South Range 34 East, being so much of the North one half of the Lowe Grant."

That complainant is unable to locate said supposed premises by said description, and says that said conveyance is void for uncertainty. See Exhibit "L" hereto.

The said James A. Braddock is deceased and W. C. Braddock is his only known heir at law, and Joseph Rosenheim claims to hold his interest as trustee for said W. C. Braddock's creditors, and claims some interest which is unknown to your complainant. He is made party hereto that he may if he can, present and prove his claim.

The interest of said Joseph Rosenheim cannot in any event be more than one-eightieth (1-80) of the premises which may be found in the above description. Complainant avers that said premises cannot be located by the description.

XXXI.

That said G. D. Bryan on the 27th day of October, 1881, by deed recorded February 1st, 1882, in Deed Book "I", page 375 of said records, did attempt to convey to one R. C. Langfoed 50 acres in said grant, and described as follows:

"Commencing at a point 1,296 yards South, 79 degrees West of the South East corner of North one-half of John T. Lowe grant, running thence along the South line of said grant 1,296 yards, 72 degrees West; thence North parallel with the East line of said grant 432 yards; thence East parallel with the South line of said grant 1,296 yards to land owned by Charles Goodrich, from there along the North line of the Goodrich land to place of beginning, in township 19-34 South and East, 100 acres.

2nd. Also beginning at the North East corner of the North half of the Lowe Grant and running from there along the North line of said grant West 648 yards; thence South and parallel with East line of said grant 432 yards to land owned by Braddock; thence East along North line of said Braddock land 648 yards to East line of said grant; thence North along the East line of said grant 432 yards to place of beginning; last tract being in township 18-34 South and East. Containing 50 acres."

Complainant says that the first described premises are included in the deed to Cyrene Hodges referred to in paragraph 34 herein, if they can be located at all, and the said conveyance is void as to the same and as to all premises attempted to be described. That no more than one sixty-fourth (1-64) undivided part thereof was conveyed, and the said R. C. Langford has since conveyed the same to C. L. Mitchell who is made a party hereto and who is entitled to no more than one sixty-fourth (1-64) of said last described 50 acres, if any portion at all. Complainant avers that he is not entitled to any portion of the premises, but that said deeds should be construed and canceled.

Certified copy of said deed is herewith filed marked Exhibit "O".

XXXII.

The said G. D. Bryan being then so seized of an undivided one sixty-fourth (1-64) interest in the premises, on the 27th day of October, 1881, conveyed to Alexander St. Clair Abrams and R. L. Summerlin by deed recorded Feb. 21, 1882 in Deed Book "I" page 378 of said records, the following described portion of said premises, to wit:

"Commencing at a point 648 yards West of the North East corner of North half of John T. Lowe Grant, and on the North line of the said grant, running thence along line of said grant West, South 79 degrees West 648 yards to land now owned by Cunningham; thence South 11 degrees East 432 yards to land owned by Braddock; thence East parallel with the North line of said grant 648 yards; thence North parallel with East boundary line of Lowe Grant 432 yards to place of beginning, all of which is in township 18–34 South and East, containing 50 acres."

And the said R. I. Summerlin conveyed the same premises to Alexander St. Clair Abrams by deed recorded in Deed Book "K," page 633 of the Volusia County Records, and the said Alexander St. Clair Abrams now holds an undivided one sixty-fourth (1-64) of said 50 acres, and no more.

XXXIII.

The said Louis H. Bryan, Philemon H. Bryan, Joseph D. Bryan, Gadsden D. Bryan and Susan Bennett on the 13th day of June, 1876, conveyed all their interest, being one-sixteenth (1-16) thereof, to Shepherd J. Hodges, by deed duly recorded February 14th, 1882, in Deed Book "J," page 104, of the records of Volusia County, Florida, in and to the following described portion of said lands as described in said deed, to-wit:

"Commencing at a hickory tree 219 yards North 11 degrees West, of where the township line between townships 18 and 19 crosses the East line of the John Lowe Grant, and running South 79 degrees West 4 miles; thence North 11 degrees East 550 yards; thence North 79 degrees East 4 miles intersecting said East line of said John Lowe Grant; thence North 11 degrees West 550 yards on said line to place of beginning, containing 750 acres more or less, and being in township 18 and 19 South 34 East."

Said deed attempts to vest in said S. J. Hodges an undivided one-sixteenth (1-16) in said 750 acres, to-wit: about forty-seven (47) acres thereof, but the lines do not meet and the deed is void for uncertainty.

XXXIV.

The said Louis H. Bryan, Philemen H. Bryan, Joseph D. Bryan, Gadsden D. Bryan and Susan Bennett on the 13th day of June, 1876 conveyed all their interest being one-sixteenth [1-16] thereof, to Cy-

rene Hodges wife of Judge R. Hodges, by deed duly recorded February 14th, 1882 in Deed Book "J" page 106 of the records of Volusia County, Florida, in and to the following described portion of said lands, to-wit:

"Commencing at a post 331 yards South 11 degrees East of where the township line between townships 18 and 19 crosses the East line of the John Lowe Grant, and running South 79 degrees West 4 miles; thence South 11 degrees East 550 yards; thence North 79 degrees East 4 miles intersecting said East line of said grant; thence 550 yards on said grant line to place of beginning, containing 750 acres more or less, situate in township 19-34 South, East."

Which said premises were duly conveyed August 7th, 1883 by said Cyrene Hodges and Judge R. Hodges, to said Shepherd J. Hodges, by deed duly recorded September 5th, 1883 in Deed Book "M", page 671 of the records of said county.

Said deeds vested in said S. J. Hodges an undivided one-sixteenth [1-16] in said 750 acres, to-wit: about forty-seven [47] acres.

XXXV.

The said P. N. Bryan on the 1st of June, 1883 being then seized of an undivided one sixty-fourth [1-64] of the premises as heir at law of the said Eliza Bryan and L. H. Bryan, who were then deceased, did by deed recorded June 18th, 1883 in Deed Book "M", page 536 of said records, convey the said one sixty-fourth [1-64] interest to said Gadsden D. Bryan, to every part and parcel of said land in the North half of the said grant.

XXXVI.

The said S. L. Hodges on the 7th day of February, 1883 being then seized of an undivided one-sixteenth [1-16] of the premises by conveyance as aforesaid, did by deed recorded June 18th, 1883 in Deed Book "M", page 539 of said records, convey the said sixteenth interest to said Gadsden D. Bryan in the following premises as described in said deed:

"Commencing at township line 18 and 19 where it crosses East line of the John Lowe grant, running North 11 degrees East to a hickory tree branded "H" 219 yards from township line 18 and 19; thence West 2,640 yards 11 degrees North to the place of beginning; thence South 550 yards; thence West 2 1-2 miles 11 degrees North to the West line of the John Lowe grant; thence North on the said line 11 degrees South 2 1-2 miles, containing 55 acres more or less."

Which vested 36.875 acres of said tract in said G. D. Bryan, leaving 10 acres in S. J. Hodges.

XXXVII.

On November 23rd, 1883 by deed recorded March 29th, 1884 in Deed Book "O" page 367 of said records, the said G. D. Bryan did attempt to convey to S. D. Harwood all the interest he the said G. D. Bryan, then had in the premises described in said deed as follows:

"Commencing at township line 18 and 19 where it crosses East line of the John Lowe Grant, running North 11 degrees East to a hickory branded "H" 219 yards from township line 18 and 19, and thence West 2,640 yards 11 degrees North to the place of beginning; thence South 550 yards; thence West 2 1-2 miles 11 degrees North to the West line of the John Lowe Grant; thence North on said line 11 degrees South 2 1-2 miles, containing 500 acres more or less."

Part of the North 1-2 of the John Lowe Grant; situated in township 19, sections 9, 10 and 11, Range 34, containing 1,300 acres, this being our entire interest and claim to every part and parcel of land in North 1-2 of the Lowe Grant."

The first described premises so conveyed would be the one thirty-second [1-32] interest in said 500 acres if the same can be located by said description, less whatever had formerly been conveyed.

The second described premises so conveyed would be the one thirty-second 1-32 of 1,300 acres in the North half of said grant, if the same can be located by said description, less what land had formerly been conveyed of said 1,300 acres."

Complainant says that by neither of said descriptions can any lands be bounded, located and identified, and that said deed is void for uncertainty of description.

The said S. D. Harwood has since conveyed by the same description, to the Harwood Land and Improvement Company defendant which now claims under him and which is made a party hereto.

Said deed is herewith field marked Exhibit "M."

XXXVIII.

On January 21st, 1885 by deed recorded January 26th, 1885 in Deed Book "T" page 427 of said records, the said G. D. Bryan did attempt to convey to Henry Harwood the same premises described in paragraph 27 herein, which had theretofore also attempted to have been conveyed to S. D. Harwood by the following description and terms as set forth in said deed:

Two tracts the first being described as follows; "Commencing at township line 18 and 19 where it crosses East line of the John Lowe Grant, running thence North 11 degrees East to a hickory branded "H" 219 yards from township line 18 and 19 and thence West 2,640 yards 11 degrees North to the place of beginning thence South 550 yards; thence

West 2 1-2 miles 11 degrees North to the West line of the John Lowe Grant; thence North on said line 11 degrees South 2 1-2 miles, containing 500 acres more or less." The second being described as follows: "All that part of the John Lowe Grant in sections 9, 10 and 11, township 19, range 34, containing 1,900 acres more or less, all estimated to contain about 2,400 acres and is same land conveyed to said Bryan by P. N. and J. D. Bryan June 1st, 1883, which included and conveyed any and all land in North 1-2 of John Lowe Grant not heretofore conveyed by said Bryan, G. D."

Said deed is herewith filed marked Exhibit "N."

Your complainant avers that this deed adds nothing to the premises conveyed by the deed marked Exhibit "M" and that the said Harwood Land and Improvement Company claim the premises which are too vague and uncertain to set off with certainty, and that neither said S. D. Harwood, Henry Harwood or the Harwood Land and Improvement Company are in actual possession of said premises, nor were they or either of them at the date of the conveyance to said Everett H. Jones of the interest of said G. D. Bryan in said grant, nor are said deeds to said S. D. Harwood, Henry Harwood and the Harwood Land and Improvement Company notices of conveyance.

XXXIX.

The said S. J. Hodges grantee of a possible undivided one-sixteenth (1-16) interest in 1,500 acres of said premises as aforesaid, attempted to convey sundry portions thereof to numerous parties but the descriptions are by numbers of an unrecorded and unknown plat and the conveyances are void for uncertainty of description, except as to Henderson Williams to whom was conveyed the premises described in Deed Book "O" page 564 supposed to contain 10 acres of said tract, the locality of which is unknown and undescribed, the said Williams having taking possession of 10 acres but whether the same which was attempted to be conveyed, does not appear of record nor of fact.

That said Isaac A. Stewart claims an interest in said premises by a pretended deed from S. J. Hodges per G. P. Healy Sheriff, recorded in Deed Book "5" page 573 of said records and attempted to be described as follows: "On North end of the John Lowe Grant, sold as the property of S. J. Hodges, the same land bought of Bryan by S. J. Hodgess," the same purporting to be 519 acres in said grant but by no possibility more than one thirty-second (1-32) of the same or 16.22 acres, the locality of which is unknown and undescribed, and the validity of which deed does not appear upon the face thereof, the same being also unsealed and likewise void for uncertainty of recitals and description, and the said deed was intended to be and is by secret agreement a mortgage

from said S. J. Hodges, but the terms and conditions thereof are unknown to complainant, and said parties should be required to set up and prove the same and in default thereof the said deed should be canceled. The said S. J. Hodges at the time of said supposed conveyance could not have had and did not have more than ten acres anywhere in said grant.

That all of said grantees are made parties and should be required to set up, exhibit and prove their claim and title if they can, and have the same adjudicated; that none of them could acquire more than the fractional parts named of the lands so conveyed for that their grantors had no more of the same, and that none of them have been or are in actual possession of the same except Henderson Williams who is in possession of ten (10) acres in said grant, but whether it is the ten acres conveyed or intended to be conveyed to him, is unknown and unknowable.

XL.

The said G. D. Bryan per U. M. Bennett of what county or state is not not officially stated, attempted on October 4th, 1886 by deed recorded October 18th, 1886 in Deed Book "2" page 40 of said records, to convey to Robert Nelson an interest in said grant described as follows:

"North East 153.03 acres of the John Lowe Grant in sections 38 and 39, township 18 South, range 34 sold as property of G. D. Bryan."

That said deed is not sealed, nor is it signed officially by any sheriff of any county or state, is not executed according to law, and is null and void and the conveyance is void for uncertainty of description and said deed should be canceled.

Certified copy of said deed is herewith filed marked Exhibit "P."

XLI.

The said G. D. Bryan on August 5th, 1889 by W. R. Fitt Master in Chancery, attempted to convey to David B. Parce by deed recorded in Deed Book 11 page 271 of said records, an interest in said grant described as follows:

"Beginning at a point in the John Lowe Grant township 19 South, Range 34 East in the South line of land owned by S. J. Hodges, and one mile Westerly from the East boundary of said grant, running thence South 11 degrees East 29.42 chains; thence Westerly at right angles 34 chains; thence Northerly at right angles 29.42 chains; thence Easterly along S. H. Hodges' line to point of beginning 34 chains the same enclosing and being 100 acres of land in the John Lowe Grant, situated in township 19 South, Range 34 East as aforesaid" that said deed was under proceedings in foreclosure of the mortgage from G. D. Bryan to S.

J. Hodges, recorded in Book 5 page 558 of said records, which said mortgage is thereby merged the same being dated the 1st day of October, 1887, and recorded the 20th day of December, 1887, six days after the conveyance to E. H. Jones.

That the interest if any, in said 100 acres is an undivided one sixty-fourth (1-64) and no more.

The said premises had been conveyed and re-conveyed by said G. D. Bryan until complainant is unable to define the interest if any, vested in said D. B. Parce. He is made a party hereto and required to set up and establish his claim if any he has.

XLII.

The complainant further says that a partition of said lands cannot be made for that many of the shares are too small and the tract is unevenly divided into hammock, pine, savanna and swamp, a large portion of which is worthless, and the same will have to be sold and distributed in money, and that all persons entitled to any part of said lands or proceeds, and all who have any claim or lien thereon have been made parties hereto and their claims should be fully set up, and proven and adjudicated; that no remedy at law exists to enable the complainant to obtain his share of said lands in kind, or of proceeds if sold, and he is wholly without remedy except in chancery, for that unless all the shareholders of said lands and all the lien holders thereon are discovered and marshaled and the valid sustained and the invalid excluded and the legal titles quieted as against the illegal, the said lands will forever remain a forlorn wildernsss.

XLIII.

The complainant further says that the taxes upon the said grant have been unpaid for many years except by your complainant; that they have been al o sold for taxes when some of the taxes were paid because of duplicate assessments in the names of several supposed owners, and also as "Unknown"; that there is a large amount of taxes thereon unpaid, the exact amount unknown, but which should be ascertained and adjudicated; that complainant has been compelled for the benefit of his co-tenants as well as for himself, to expend large sums of money, to-wit: $600.91, to hold possession of said grant and to prevent waste and injury to the freehold, part of which expenditures are for improvements valuable to all the co-tenants as overt acts and evidences of posession and ownership, and will be compelled to continue such expenditures; and complainant has also inc irred large expenses and liability in connection with this action for counsel and court costs, for all of which he is entitled to reimbursement; that all said taxes so paid, and expenditures for the benefit of the estate, as well as counsel fees

for the discovery and marshaling of the legal co-parceners, and of setting off to each in severalty or of creating a fund for distribution to each in person are a proper charge and lien upon said lands or upon the proceeds thereof if sold, and should be adjudicated and taxed and paid by every co-parcener in proportion to his or her share in severalty.

XLIV.

Complainant further says that no other person or persons than the parties hereto have any interest in, or title to the premises aforesaid; that by reason of the great length of time which has elapsed since the death of said John T. Lowe, of the disturbed condition of the country, and of the scattering of the numerous families who have become, or tried to become interested in the said grant, it has been almost impossible to trace the lineage of the several families and to find the actual parties in interest; that the leading representatives of the several families who are parties hereto ought to be required to set forth and show the genealogies of their respective families and the changes that may occur pendeate lite, and to produce and exhibit the ancient deeds and documents, family records and other muniments of title and evidences of inheritance or devise and to identify and verify the last heirs and devisees of their respective ancestors.

XLV.

The actual tenants in common entitled to partition or distribution are as follows:

	Shares.	Acres.		
R. J. Lowe	1-96	104.33		
R. H. Lowe	1-96	104.33	208.66	
Carroll Lowe	1-240	41.73		
Ellie Lowe	1-240	41.74		
Manning Lowe	1-240	41.73		
Fannie Lowe, Jr.	1-240	41.74		
Marie Lowe	1-240	41.73	208.67	
Lucy Lowe	1-48	208.66		
Susan Davis	1-48	208.67		
Sophia Davis	1-48	208.66		
Sarah Lowe	1-48	208.67	834.66	1252
Phil E. Lowe	1-24	417.33		
G. P. Greeley from Taylor & Ivey	1-24	417.33		
S. C. Warner from Taylor & Ivey	1-24	417.34		1252
P. N. Bryan	1-192—15.62	36.54		
J. D. Bryan	1-64—15.62	140.88		
Marian Bennett	1-28—7.81	70.44		
George Bennett	1-28—7.81	70.44		
G. P. Greeley from	5-384 plus			
G. D. Bryan	18.44—8.72	143.85		
S. C. Warner from	5-384 plus			
G. D. Bryan	18.44—8.72	143.85		
S. J. Hodges		10.00		
Henderson Williams		10.00	626.	
G. P. Greeley from Mickler	1-32	313.		
S. C. Warner from Mickler	1-32	313.	626.	1252
Hez. Foster	1-336	29.83		
Sarah Foster	1-336	29.83		
Mary Johns	1-336	29.84	89.50	
Greeley from Fosters	1-224	44.75		
Warner from Fosters	1 224	44.75	89.50	
Greeley from Smith-Clark	5-112	447.10		
Warner from Smith-Clark	5-112	447.10		
T. J. Smith, Jr.		178.80	1073.00	1252
Greeley from McCall, Dodd	1-16		626.	
Warner from McCall, Dodd	1-16		626.	1252
C. W. Balis	1-8			1252
J. Houston M. Clinch	1-4			2504
Total acres				10,0016

To the end therefore that the defendants if they can, show why your complainant should not have the relief prayed hereby, and may upon their several respective oaths according to the best and utmost of their respective knowledge, remembrance, information and belief, full, true, direct and perfect answer make to this Bill of Complaint, and to each of the several interrogatories hereinafter numbered and set forth as are herein by note under-written and numbered respectively, that is to say:

1st. Whether it is not a fact that all of the several surviving heirs of the said John T. Lowe deceased, are parties hereto, except such as have conveyed their shares, together with their actual as well as supposed and possible grantees and their several heirs and personal representatives when deceased?

2nd. Whether it is not a fact that all who have any claim or lien upon the premises, which ought to be set up and construed by the court, are parties hereto?

3rd. Whether it is not true that the exact share which each legal claimant to said premises would be entitled to on partition, is set out.

4th. Whether you know of any other legal and surviving claimant to any portion of said premises, and if you do, that you disclose the name, relationship, citizenship and share of such claimant with such proofs as are competent.

To Donald McRae and Walter A. Drake:

5th. Whether it is not true that all the heirs and legal representative of Archibald McRae, Alexander McRae and John McRae deceased, except such as have conveyed to you, are defendants ,and if you deny it, that you name the heirs or legal representatives of said decedents, their ages, relationship and citizenship.

To J. Houston M. Clinch:

6th. Is it not true that the estate of Duncan L. Clinch deceased, is not settled up, and that the lands described in this Bill are still in your hands as executor of the last will and testament of said testator, and if you deny it then name the several devisees and their personal, representatives, their relationship and citizenship.

7th. If the heirs and devisees of D. L. Clinch deceased are not all correctly listed and named please give their names and residences.

To Philip E. Lowe and Sarah Lowe:

8th. Is it not true that John T. Lowe and Susan Lowe his wife, your ancestors, were married prior to the year 1810 and that neither of them deceased until after the year 1820?

9th. Is it not true that your respective fathers were born of John T. Lowe and Susan Lowe, prior to the year 1810 and neither of the latter are known to have died prior to 1820?

To Philemon N. Bryan and Joseph D. Bryan:

10th. Is it not true that Marian Bennett and George Bennett are the sole surviving heirs at law of Susan Bennett deceased, and that no administrator has been appointed?

11th. Is it not true that Eliza Bryan your mother, died intestate many years ago, and that no administrator has been appointed?

12th. Give exact date of death of Eliza Bryan, L. H. Bryan and Susan Bennett?

And that the different deeds exhibited to this Bill and which may be filed herein, may be construed, that the interest if any, conveyed, may be ascertained and where none is conveyed such deeds be so construed and canceled.

And that all persons having any claim or lien on the lands described may be brought in and required to set up and prove their claim or lien or have the same held null and void.

That partition of said lands may be made if possible and equitable, and if not equitable that they may be sold and the proceeds distributed.

That complainant recover his advances and outlays for taxes and expenses including costs and counsel fees in this case, and that a Master be appointed to state the shares, advances and fees.

That commissioners may be appointed to make such partition or sale as the court may order, and to execute the decree of the court:

That complainant may have all other and further equitable relief proper and necessary:

May it please your honor to grant the writ of subpœna for

Alexander St. Clair Abrams, Joanna Abrams, Philemon N. Bryan, Lucy Bryan, Joseph D. Bryan, Jr., Martha Bryan, George Bennett, Polly Bennett, Marian Bennett, a minor over fifteen years old, Anna Caven individually and as administratrix of the estate of W. H. Caven deceased, Albert S. Goodrich, Charles W Goodrich, Hester Goodrich, W. A. Goodrich, N. M. Goodrich, A. C. Goodrich, Annie Goodrich, Frances R. Goodrich, Elizabeth Goodrich, Georgiana Bryan, Henry Guller, Anna Guller, Shepherd J. Hodges, Mary S. Hodges, Robert S. Nelson, Harriett Nelson, Isaac A. Stewart, Kate B. Stewart, Arthur G. Hamlin, Ella P. Hamlin, David B. Parce, Maria Parce, Henderson Williams, William R. Bush, Charles R. King, Walter A. Drake, Hezekiah Foster, minor, Sarah Foster, minor, both over fifteen years old, James M. Foster their guardian, Mary F. Johns, Henry B. Johns, Philip E. Lowe, Virgin a T. Lowe, Thomas L. Smith, Bessie Smith, Carrie E. Jackson, William F Jackson, Henry Burke, Willis W. Burke, Jr., Mary Green, John Green, Granville B. Burke, Edward E. Cleveland, The Harwood Land and Improvement Company, Charles L. Mitchell, Joseph Rosenheim, J. Houston M. Clinch, individually and as executor and trustee of the last will of Duncan L. Clinch deceased, Clarence W. Balis, Samuel C. Warner, Sophia L. Davis, Nicholas Davis, Susan R. Davis Dewitt C. Davis,

Sarah Lowe, Lucy Lowe, Richard H. Lowe, Robert J. Lowe, Ellie Lowe, Carrol Lowe, Manning Lowe, Fannie Lowe, Jr., Marie Lowe a minor eighteen years of age, and Fannie Lowe guardian of said minor, Donald McRae, Nancy McRae, Mary G. Van Vorst, Frederick B. Van Vorst, Sallie McRae, Carolina D. McRae, Georgie U. McRae a minor eighteen years old, Frederick D. McRae a minor fifteen years old, Walter McRae a minor thirteen years old, Christina Williams, Jackson Williams, a minor, Alexander Purviance a minor, Gerald Purviance a minor over eighteen years old, Eliza B. Anderson, Duncan Clinch, Jr,, George Clinch, Houston Clinch, Jr., H. A. Clinch, William Heyward, Clinch Heyward, Bayard Heyward, Bayard Clinch, Floyd Clinch and Mary L. Clinch, the widow and unknown heirs of G. W. Clinch, certain unknown heirs of Alexander, John and Archibald McRae deceased—commanding them to appear and direct, full and perfect answer make to this Bill of Complaint, and to abide by and perform the decree of the Court herein.

JAMES R. CHALLEN,
Solicitor and Counsel for Complainants.

Note:

Those defendants who are able to answer upon their own knowledge, or by supplying competent evidence to sustain their answers, are required to answer the interrogatories respectively numbered 1, 2, 3, 4; Donald McRae and Walter A. Drake number 5; J. Houston, M. Clinch numbers 6 and 7; Philip E. Lowe and Sarah Lowe numbers 8 and 9, and supply sworn copies of proper entries in the Family Bible or Family Record; Philemon H. Bryan and Joseph D. Bryan numbers 10, 11 and 12.

JAMER R. CHALLEN,
Complainant's Solicitor.

At the end of this Bill is the following endorsement:

"This Bill is hereby dismissed this 15th day of June, 1882.

CHAS. SWAYNE,
Judge."

Endorsed:

Circuit Court United States, Northern District of Florida. In Chancery. For Partition of Real Estate. G. P. Greeley et al. vs. R. H. Lowe et al. Bill of Complaint. Filed Nov. 3d, 1891.

PHILIP WALTER,
Clerk.

JAMES R. CHALLEN,
Complainants Solicitor.

Circuit Court of the United States,
Northern District of Florida S. S.
In Chancery.

G. P. GREELEY ET AL.,
vs.
RICHARD H. LOWE ET AL.

AFFIDAVIT FOR SERVICE BY PUBLICATION.

James R. Challen being first duly sworn says he is solicitor for complainant who is now absent from the State of Florida and that service of subpœna can not be made within the Northern District of Florida upon the following defendants who are non-residents of said district and absent therefrom, to-wit:

Joseph Rosenheim, trustee of the creditors of W. C. Braddock, J. Houston, M. Clinch individually and as trustee and executor of the last will of Duncan L. Clinch deceased, Clarence W. Balis, Samuel C. Warner, —— Warner his wife, Sophia L. Davis, Nicholas Davis her husband, Susan R. Davis, Dewitt C. Davis her husband, Sarah Lowe, Lucy Lowe, Richard H. Lowe, Robert J. Lowe, Ellie Lowe, Carroll Lowe, Manning Lowe, Fannie Lowe, Jr., Marie Lowe a minor eighteen years of age, Fannie Lowe individually and as guardian of said minor, Donald McRae, Nancy McRae his wife, Mary H. Van Vorst, Fred B. Van Vorst her husband, Sallie McRae, Carolina D. McRae, Georgie U. McRae a minor over eighteen years old, Frederick D. McRae a minor over fifteen years old, Walter McRae a minor over thirteen years old, Christiana Williams, Jackson Williams a minor fifteen years old, Alexander Purviance and Gerald Purviance, minors over fifteen years old, Bayard Clinch Floyd Clinch, Mary L. Clinch, Henry A. Clinch, William Heyward, Clinch Heyward, Bayard Heyward, W. T. Purviance, Carolina A. Drake and —— Drake her husband, Margaret E. Gurganus and —— Gurganus her husband, first names unknown, Maria Makepeace and George H. Makepeace her husband, Margaret H. Markham and F. Markham her husband, Mary C. Rother and R. S. Rother her husband, Colin McRae and Annie McRae his wife, Donald L. McRae and Nancy McRae his wife, Kate A. Vink and —— Vink her husband, Annie P. Aldeman and William Aldeman her husband, John McRae, James D. McRae, William W. McRae, Roderick McRae, Mary A. Grace and B. F. Grace her husband, Sallie McRae Chater and R. Dundas Chater her husband, and George McRae, Eliza B. Anderson, Duncan Clinch, Jr., George Clinch, Houston Clinch, Jr., the widow, name unknown, and unknown heirs of G. W. Clinch deceased, certain unknown, heirs of Alexander, John and Archibald McRae deceased, The Harwood Land & Improvement Company, alleged to be a Florida Corporation but whose officers and place

of business are unknown and have not been found within said District. All of full age except where statedto be minors; and that the relief sought is the partition among the above defendants and others, and quieting the title as to those defendants not entitled to partition in those entitled to partition, of the following described lands in Volusia County, Florida, known as the John Lowe Grant and described as section 46, township 18 South, range 34 East, containing 994 acres, section 47 same township and range, containing 859 acres; section 38 containing 510 acres; section 39 containing 7,528 acres, and section 40 containing 125 acres, all in township 19 South, range 34 East, aggregate 10,016 acres.

JAMES R. CHALLEN.

Sworn to and subscribed before me
this 3rd day of Nov. A. D., 1891.
PHILIP WALTER,
Clerk.

Endorsed:

Circuit Court United States, Northern District of Florida. In Chancery. G. P. Greeley et al. vs. R. W. Lowe et al. Affidavit for Publication. Filed Nov. 3rd, 1891. Philip Walter, Clerk. James R. Challen, Complainants' Solicitor.

Circuit Court of the United States,
Northern District of Florida.
In Chancery.

G. P. GREELEY ET AL.,
vs.
RICHARD H. LOWE ET AL.
} Order of Publication.

The complainant George P. Greeley by James R. Challen his solicitor, now comes and exhibits the Bill of Complaint herein for the partition among the defendants herein named and others, and for quieting the title as to those defendants not entitled to partition in those entitled to partition, of the following land in Volusia County, Florida, known as the John Lowe Grant, and described as section 46, township 18 South Range 34 East, containing 994 acres; section 47 same township and range, containing 859 acres; section 38 containing 510 acres; section 39 containing 7,528 acres, and section 40 containing 125 acres, all in township 19 South range 34 East, aggregate 10,016 acres, and it appearing to the court that the following named defendants are non-residents of this district and cannot be served with subpœna, to-wit: Joseph Rosenheim, trustee of the creditors of W. C. Braddock, J. Houston M. Clinch individually and as trustee and executor of the last will of Duncan L. Clinch deceased, Clawrence W. Balis, Samuel C. Warner,——Warner his wife, Sophia L. Davis, Nickolas Davis her hus-

band, Susan R. Davis, Dewitt C. Davis her husband, Sarah Lowe, Lucy Lowe, Richard H. Lowe, Robert J. Lowe, Ellie Lowe, Carrol Lowe, Manning Lowe, Fannie Lowe, Jr., Marie Lowe, a minor eighteen years of age, Fannie Lowe individually and as guardian of said minor, Donald McRae, Nancy McRae his wife, Mary G. Van Vorst, Fred B. Van Vorst her husband, Sallie McRae, Carolina D. McRae, Georgie U. McRae a minor over eighteen years old, Frederick D. McRae, a minor fifteen years old, Walter McRae, a minor thirteen years old, Christiana Williams, Jackson Williams a minor fifteen years old, Alexander Purviance and Gerald Purviance minors over fifteen years old, W. T. Purviance, Carolina A. Drake and——Drake her husband, Margaret E. Gurganus and——Gurganus her husband, first names unknown, Maria Makepeace and George H. Makepeace her husband, Margaret H. Markham and F. E. Markham her husband, Mary C. Rother and R. S. Rother her husband, Colin McRae and Annie McRae his wife, Donald L. McRae and Nancy McRae his wife, Kate A. Vink and——Vink her husband, Annie P. Aldeman and William Aldeman her husband, John McRae, James D. McRae, William W. McRae, Roderick McRae, Mary A. Grace and B. F. Grace her husband, Sallie McRae Chater and R. Dundas Chater her husband, and George McRae, Eliza B. Anderson, Duncan Clinch, Jr., George Clinch, Houston Clinch, Jr., Bayard Clinch, Floyd Clinch. Mary L. Clinch, H. A. Clinch, William Heyward, Clinch Heyward, Bayard Heyward, the widow (name unknown) and unknown heirs of G. W. Clinch deceased, certain unknown heirs of Alexander, John and Archibald McRae deceased, The Harwood Land and Improvement Company alleged to be a Florida corporation but whose officers and place of business are unknown and have not been found within said district; and that all of said defendants are of full age except where stated to be minors, it is ordered that notice be given to said defendants of the pendency and prayer of said Bill of Complaint, by publishing a copy of this order for six consecutive weeks in the Southern Courier, a newspaper published in the City of Jacksonville, in said district, and it is further ordered that unless said defendants enter their appearance in this cause and to said Bill do plead, answer or demur, on or before the first Monday in January, A. D. 1892, default will be taken and a decree pro confesso entered against them and each of them and the cause will then proceed ex parte.

Done in Court this 3rd day of November, A. D. 1891.

CHARLES SWAYNE,
United States Judge.

Endorsed:

United States Circuit Court, Northern District of Florida. In Chancery. G. P. Greeley et al., vs. Richard H. Lowe, et al. Order of Publication Filed November 3rd, 1891. Philip Walter, Clerk. J. R. Challen, Solicitor.

DUVAL COUNTY,)
S. S.
STATE OF FLORIDA.)

Personally appeared before me E. M. Williams, who being duly sworn, deposes and says: That he is Business Manager of the Southern Courier a newspaper published in the City of Jacksonville, County of Duval, State of Florida; and that the annexed advertisement was regularly inserted for six consecutive weeks, viz: November 5th, 12th, 19th, 26th and December 3rd, 10th, 1891, in said Southern Courier, which is entered in the Post office of Jacksonville, Florida, as second class matter according to law. E. M. WILLIAMS.

Sworn to and subscribed before
me this 14th day of December, 1891.
JOSEPH E. LEE,
Notary Public.

[Duly Advertised.]

Costs of Publication 9 sq. 6 weeks $31.50

Endorsed:

Circuit Court United States, Northern District of Florida. In Chancery. G. P. Greeley et al., vs. R. H. Lowe. Proof of Publication. Filed December 26th, 1891. Philip Walter, Clerk, by John S. Driggs, Deputy Clerk. James R. Challen, Complts. Sol.

In the Circuit Court of the United States,
Northern District of Florida.
In Chancery.

GEORGE P. GREELEY, ET AL.,) Complainants,
vs.
RICHARD H. LOWE, ET AF.,) Defendants.

And now on this the 4th day of January A. D. 1892, come the defendants Christiana Williams, by Hamlin and Stewart her Solicitors, appearing specially and solely for the purpose of making this their motion, and move the Court to grant an order to discharge the service or attempted service herein on these defendants, upon the following grounds, to-wit:

1. Because no subpoena or order of this Court, requiring this defendant to appear, plead, answer or demur herein at any time, appears to have been served upon this defendant, and the publication of the order herein is insufficient legally to notify this defendant of the pendency or nature of the suit, or to give the Court jurisdiction of the cause or of the person of this defendant.

2. Because of other defects in the alleged service by publication herein apparent upon the face of the records.

HAMLIN & STEWART,
Solicitors for Defendants.

Endorsed:

In Circuit Court, Northern District of Florida. In Chancery. G. P. Greeley, et al., vs. R. H. Lowe, et al. Special Appearance of Christiana Williams. Filed January 4th, 1892. Philip Walter, Clerk. Hamlin & Stewart, C. R. King and W. R. Bush, Defendants' Solicitors.

In Circuit Court of the United States,
Northern District of Florida.
In Chancery.

GEORGE P. GREELEY, ET. AL.) Complainants,
vs.
RICHARD H. LOWE, ET. AL.) Defendants.

The Plea of Isaac A. Stewart, to the Bill of Complaint of George P. Greeley et al., Complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said Complainants Bill mentioned, to be true in such manner and form as the sale are therein and thereby alleged and set forth, doth plead thereto, and for plea says:

1. For a first plea to the jurisdiction of this Court this defendant says that suit herein is not brought in the District of the residence of either Complainants or defendants, in that Complainants and many of defendants who are material parties, reside without the Northern District of Florida, and are citizens of several different States.

2. For a second plea to the jurisdiction of this Court this defendant says that the controversy set forth in the Bill of Complaint is not a controversy between citizens of different States, in that defendants David B. Parce, Samuel C. Warner and Mary C. Van Vorst, are all residents and citizens of New York, and are all material parties to said Bill, and their several interests are adverse one to the other, and this Court has not jurisdiction herein upon any other ground provided by law than an alleged difference in citizenship of the parties thereto.

3. For a third plea to the jurisdiction of this Court this defendant says that the controversy set forth in the Bill of Complaint is not a controversy between citizens of different States in that S. J. Hodges and many other defendants, who are residents and citizens of the State of Florida, and who claim title by virtue of an alleged ancient deed from Wm. M. Reed, Administrator of the estate of John T. Lowe, to one Eliza Bryan, and by adverse possession thereunder for many years, possess interests adverse to Richard H. Lowe, and many other defendants, also residents and citizens of the State of Florida, who claim title solely as heirs or grantees of heirs of said John T. Lowe, and Susan Lowe, his wife, both deceased, and claim to be thus possessed of the very same property conveyed or attempted to be conveyed by said Administrator's deed, and in that the interests of those so claiming either under said administrator's deed or as heirs of grantees of heirs of said John T.

and Susan Lowe are adverse to the interests of the widow and heirs of G. W. Clinch, deceased, also citizens of the State of Florida, defendants herein who claim title to a definite portion of said property under an alleged ancient deed executed by said John T. Lowe, in his life time, to one George I. F. Clarke, and who deny that said John T. Lowe died intestate or that Susan Lowe died possessed of any interest in said property which her said heirs acquired, and in that the interests of Walter A. Drake, defendant, also a citizen of the State of Florida, who claim title to an undivided interest in all said property under an alleged ancient deed from Susan Lowe to Alexander and John McRae, executed in the life time of said Susan, are adverse to the interests of all the other defendants. citizens of the State of Florida aforesaid; and all said defendants are material parties, and this Court has not jurisdiction herein upon any other ground provided by law than an alleged difference in citizenship.

4. For a fourth plea to the jurisdiction of this Court, this defendant says that one of defendants, Eliza B. Anderson, is a resident and citizen of the District of Columbia, that she claims an undivided interest as co-tenant in the entire south half of the property sought to be partitioned herein and is therefore a necessary party to the suit, that her claim to title is adverse to this defendant and to all parties to said Bill except the heirs of Duncan L. Clinch, who are defendants herein, that the controversy thus raised is a controversy between this and other defendants, citizens of Florida, and of several different States and said Eliza B. Anderson, a citizen of the District of Columbia as aforesaid, that this Court only has jurisdiction herein because of an alleged controversy between citizens of different States which in fact is thus shown not to exist.

5. For a fifth plea this defendant says that the Complainant, Mary P. Greeley, is improperly joined in this suit, in that she is not a co-tenant or in any manner interested in the relief sought by said Bill, and cannot maintain this suit against this, or any defendant herein.

6. For a sixth plea this defendant says that Joanna Abrams, Lucy Bryan, Martha Bryan, Polly Smith, Hester Goodrich, Anna Goodrich, Anna Guller, Mary Susan Hodges, Harriet Nelson, Kate B. Stewart, Ella P. Hamlin, Maria Parce, Virginia T. Lowe, Bessie Smith, and the respective wives of all other defendants who are joined herein and who are not shown to be co-tenants, or to possess interests in their own proper right, are improperly joined herein, in that they possess no legal interest in the property sought to be affected by said Bill, and as against them said Bill cannot be maintained.

7. For a seventh plea this defendant says that the estates of W. H. Caven and of Duncan L. Clinch are not yet fully settled are in course of administration, and that defendants, Anna Caven as administratrix

of the estate of W. H. Caven, deceased, and J. Houston M. Clinch, as Executor of the last will and testament of Duncan L. Clinch, deceased, are improperly joined as defendants herein, that they represent material interests herein, and that partition cannot be maintained until said estates are fully administered.

8. And for an eighth plea herein this defendant says that on the 21st day of December, A. D. 1889, Donald McRae, and others, of whom this defendant was one, and all of whom are parties herein, exhibited their Bill of Complaint in the Circuit Court of the 7th Judicial Circuit of Florida, in and for Volusia County, on the Chancery side thereof, against G. P. Greeley, Complainant herein and against other defendants herein, alleging a cause of action by and between the same material parties as in the Complainant's present Bill mentioned, for the purpose of obtaining a decree of partition of the very same real estate in Complainant's present Bill mentioned, and none other, and praying relief in the same manner and to the same effect as the Complainants now pray by their said present Bill; and all defendants to said former Bill were duly served and appeared or suffered default, and the said Greeley appeared and put in his answer to said former Bill substantially as herein set up in this Bill and Complainants therein replied to such pleading, and the several proceedings in said former cause remained depending in said State Court until the summer or fall of A. D. 1890, when said G. P. Greeley, defendant therein, and Complainant herein, filed a petition in said State Court for the removal of said former cause from said State Court to this Court, alleging among other things that as to him, the said G. P. Greeley, the controversy was separable, and a certified copy of the record therein was duly filed in this Court, and by an order of the Honorable Charles Swayne, presiding Judge of this Court, bearing date the second day of January, A. D. 1891, the said former cause was removed to this Court and was docketed herein, motions were duly made to remand the same to the State Court, but have never been argued, and said former cause now remains depending and as of record in this Honorable Court, the said cause being yet undetermined and undismissed.

All of which matters and things contained in the eight foregoing pleas defendant avers to be true, and pleads the same to the whole of said Bill, and as to the jurisdiction of this Court, and demands the judgment of this Honorable Court whether he ought to be compelled to make any answer to the said Bill of Complaint and prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

ARTHUR G. HAMLIN,
Solicitor for Defendant.

I certify that in my opinion the foregoing plea is well founded in point of law.

ARTHUR G. HAMLIN,
Solicitor for Defendant.

STATE OF FLORIDA, }
S. S.
COUNTY OF VOLUSIA. }

Personally appeared before me Isaac A. Stewart, who being duly sworn says that he is the defendant above named in the above entitled cause, and that he has read the foregoing plea, and that the same is not interposed for delay, and is true in point of fact.

ISAAC A. STEWART,
Defendant.

Subscribed and sworn to before me
this 2nd day of January, A. D. 1891.
[SEAL] SILAS B. WRIGHT,
Notary Public.

Endorsed:

In Circuit Court, Northern District of Florida. In Chancery. G. P. Greeley et al., vs. Richard H. Lowe, et al. Plea of Isaac A. Stewart. Filed January 4th, 1892. Philip Walter, Clerk. Arthur G Hamlin, Solicitor for Defendant.

In the United States Court, 5th Judicial Circuit, in and for the Northern District of Florida.

GEORGE P. GREELEY, ET AL., vs. GEORGE BENNET and POLLY his wife, MRS. POLLY BENNETT and GEORGE, her husband, and JOSEPH D. BRYAN JR., and MARTHA his wife, MRS. MARTHA BRYAN, and JOSEPH, her husband, MARIAN BENNET, a minor, and P. N. BRYAN and wife, ET AL.

Bill for Partition.

DEMURRER OF ABOVE MENTIONED DEFENDANTS.

The demurrer of the above mentioned defendants all of the State of Florida, to the Bill of Complaint of George P. Greeley, et al., against these defendants and others in chancery exhibited.

These defendants; by protestation, not confessing or acknowledge all or any of the matters and things in the said Bill of Complaint contained, to be true in manner and form as the same are therein set forth, do demur thereto, and for cause of demurrer show:

That it appears by the Bill on the face of the same that the United States Court has not jurisdiction of the same.

Wherefore, and for other errors and imperfections these defendants demand the judgment of this Court whether they shall be compelled to make any further or other answer to the said Bill, or any of the matters and things contained therein; and prays, that they be dismissed with

their reasonable costs in this behalf sustained.

E. K. FOSTER,
Solicitor for Defendants.

I hereby certify that the foregoing demurrer is well found in law in my opinion.

E. K. FOSTER,
Solicitor for Defendants.

STATE OF FLORIDA,
COUNTY OF ORANGE.

Personally appeared before me, E. K. Foster, Esq., who having been duly sworn deposes and says that he is Solicitor for the above named defendants and that the foregoing demurrer is not interposed for delay only.

E. K. FOSTER,
Solicitor for Defendant.

Sworn and subscribed to before me this 4th day of January, 1892.

[SEAL] Chas. S. PARTRIDGE,
Notary Public Florida.

The law points to be argued are contained in the demurrer.

Endorsed:

In the United States Court, 5th Circuit Northern District State of Florida. George P. Greeley, et al, vs. J. D. Bryan, Jr., et al. Demurrer of Part of defendants to Bill. Filed January 5th, 1892. Philip Walter, Clerk. E. K. Foster, Solicitor for Defendants.

Circuit Court of the United States,
Northern District of Florida.
In Chancery.

G. P. GREELEY ET AL.,
vs.
RICHARD H. LOWE ET AL.

And now comes complainant and moves the Court for leave to amend the Bill by inserting after the name of Eliza Anderson in the introductory part of the Bill the averment so as to read "citizen of South Carolina now resident in Washington, D. C.," and to add at the end of the introductory clause after the names of the other defendant the names of "Samuel C. Warner and Grace Warner his wife citizens of New York, resident at Utica, and Clarence W. Balis, citizen of Pennsylvania, resident of Philadelphia," and represents and shows to the court that the statements and averments of the Bill show the interests of these parties, they are named in the prayer for subpoena, and the omission in the introductory clause was an inadvertant and clerical omission and

such amendment does not mislead the defendants for that no copy has been taken out of the Clerk's office. January 26th, 1892.

JAMES R. CHALLEN,
Complainants Solicitor.

In Circuit Court, United States
Northern District of Florida.
In Chancery.

GEORGE P. GREELEY ET AL.,
vs.
RICHARD H. LOWE, ET AL.,

And now come defendants Arthur G. Hamlin, Ella F. Hamlin, Kate B. Stewart and Isaac A. Stewart, of defendants herein, by Hamlin Stewart their Solicitors and move the court to dismiss their Bill herein and to disallow and strike out the foregoing motion of complainants herein to be allowed to amend their Bill alleging the citizenship of Eliza B. Anderson to be in South Carolina, rather than in the District of Columbia, and by inserting the names and citizenship of Samuel C. Warner and Clarence W. Balis in the introductory part of the Bill etc.

First. Because it is improper practice to make amendments by interlining the original Bill.

Second. Because the motion is unaccompanied by affidavit required by Rule 29.

Third. Because no due notice of such motion has been given, the only notice being the entry of the motion on the docket at the time it was made.

Fourth. Because the amendments alluded to in said motion were raised by these and other defendants by pleas and demurrer filed herein, and said pleas and demurrers have been set down for hearing by Complainants and the same are being argued at the very time said motion is made and said questions are actually under discussion.

Fifth. Because the allowance of said motion will deprive defendants of the full benefit of their demurrers and pleas, and of their right to plead or demur to the Bill thus amended, and may cast upon them the cost of demurrers or pleas overruled by reason of the ilimination of the questions alluded to in said motion from such demurrer and pleas and from the consideration of the Court thereunder.

Sixth. Because the full benefit of the relief sought by said motion can be obtained by complainants, if they are entitled to said relief, upon the ruling of the Court upon the sufficiency of said demurrers or pleas,

Seventh. Because the court can make no order in any cause where in there is lack of jurisdiction, except an order dismissing the proceeding or setting aside orders made before the want of jurisdiction was discovered, and upon the face of this Bill and the pleadings it appears the

controversy set up is not a controversy between citizens of different States, within the meaning of the law—or one of which the Court has jurisdiction.

Jan, 26th, 1892.

HAMLIN & STEWART,
of Solicitors for Defendants.

Circuit Court of the United States,
Northern District of Florida.

GEORGE P. GREELEY, ET. AL.
vs.
RICHARD H. LOWE, ET. AL.

This cause coming on to be heard upon the motion by complainants to amend their Bill, was heard and submitted, and the said motion is granted and it is ordered that in the introductory clause of the Bill after the name of Eliza Anderson and after the words "is a citizen of" there be inserted "South Carolina, now residing in," so as to make the averment: "Eliza Anderson is a citizen of South Carolina, now residing in Washington City, District of Columbia;" and at the end of the introductory clause add the following: "Samuel C. Warner and Grace Warner his wife citizens of New York, resident at Utica, and Clarence W. Balis citizen of Pennsylvania, resident Philadelphia," the same having been omitted from the introductory clause by inadvertance and clerical error.

And the cause coming on further to be heard upon the question of the jurisdiction of this court, and it appearing to the court that while it is true that the complainants are citizens of New Hampshire and resident there, and some of the defendants are citizens of Florida in the district in which the land lies, yet because there are other defendants citizens of New York, and also others citizens of other States than the State in which the complainants reside and have citizenship, and also citizens of other Federal districts, than that where the land is situate, and where certain defendants reside, now therefore it is adjudged and decreed that this court has not jurisdiction over all the defendants to this action because they are not all citizens and residents of the district in which the land sought to be partitioned lies and are not all found in said district at the time of service of process, although they are all residents and citizens of other States than that in which the complainants have their residence and citizenship and now although the complainants are willing to amend their Bill and forego any finding quieting title, and to confine their prayer to partition only and such findings as must necessarily be made to decree partition of the lands described in the Bill, yet the court holding that it has not jurisdiction of the parties considers such, or any other amendment fruitless, for that the Bill must

be and is hereby dismissed.

Done this 12th day of April, 1892.

CHAS. SWAYNE,
Judge.

Endorsed:

Circuit Court United States Northern District of Florida. G. P. Greeley, et al. vs. R. H. Lowe, et al. Final decree. Filed April 12th, 1892. Philip Walter, Clerk. James R. Challen, Complainants' Solicitor.

Circuit Court of United Saates,
Northern District of Florida.
In Chancery.

G. P. GREELEY ET AL.,
vs.
RICHARD H. LOWE ET AL.

Petition for Re-Hearing.

TO THE HONORABLE JUDGES OF SAID COURT:

The complainants now come and present this their petition for a rehearing of this cause as to the jurisdiction of this court over the parties to this action and respectfully represent that if they can be heard they propose to show to the court that by the constitution and laws of the United States and by the rules of this court, it has jurisdiction of all the parties who are citizens of other States than that in which the complainants reside and have their citizenship, although they did not all reside and could not all be found in the district where the suit was brought at the time of service of process, because the jurisdiction of the court is not founded only on the fact that the action is between citizens of different States, but also on the fact that the said defendants are parties to "a suit in equity to enforce a legal claim against real property within the district where the suit is brought and are not inhabitants of nor found within said district," according to section 738 of the Revised Statutes of the United States, and that suit cannot be brought in the district which the said absent defendants inhabit, for that the action is local and fixed and is not transitory, and for that the proceeding here is for partition, which is of the nature of a proceeding in rem, the *res* being in this district, and the absent defendants being interested and having legal or equitable claims therein, and no action for partition can be brought in the district of the defendants unless they reside in the district where the land is situate, but that the complainants being citizens of New Hampshire and all the defendants being citizens of other States than New Hampshire, and the land being situate in this district, the action cannot be brought in any other than this district and the complainants not being residents of this district are entitled to venue in this court, and as jurisdiction in this district is not founded

only on the fact that this action is between citizens of different States, but also on the fact that the land is located in this district, this court not being called upon to render a personal judgment against any of the defendants to be executed in any other district but in this district only, and there being no order of arrest nor any civil process requiring bail, or requiring the personal presence of any defendant, the residence of certain defendants in other districts than this is not bar to the jurisdiction of this court.

And your petitioners will humbly show to the court that they are entitled to be heard in this court, and that if no other relief can be granted than relief to them, that they are entitled to have their own lands set off to them and the lands belonging to defendants who object to partition can be left to all the other parties to this suit unpartitioned, and to the end that full and equal justice may be done to your petitioners and that they may be heard in the forum of their choice they humbly pray for a rehearing of this cause when they will maintain the allegations and averments herein and present new and additional authorities and precedents for the further consideration of the court which your petitioners humbly hope will enable them to obtain the right in severalty to the premises described in the Bill, or to so much thereof as they claim to be seized of in fee, and therefore your petitioners pray for a rehearing, and will ever pray.

JAMES R. CHALLEN,
Complainants Solicitor.

DUVAL COUNTY,)
STATE OF FLORIDA.) S. S.

James R. Challen being first duly sworn says he is solicitor for complainants who are now absent from this County and that he is more cognizant personally of the facts and averments in this petition than they, and that he believes the facts stated in this petition to be true.

JAMES R. CHALLEN.

Sworn to and subscribed before
me May, 1892.
PHILIP WALTER.
Clerk.

Endorsed:
Circuit Court United States Northern District of Florida. In Chancery. G. P. Greeley et al., vs. R. H. Lowe, et al. Petition for Rehearing. Filed May 6th, 1891. Philip Walter, Clerk, by John S. Driggs, Deputy Clerk.

United States Circuit Court, Northern District of Florida. In Chancery.

GEORGE P. GREELEY ET AL.,
vs.
R. H. LOWE ET AL.

The petition for a rehearing in this cause coming on to be heard, was argued by counsel, and submitted to the court, and taken under advisement.

Upon due consideration it is ordered, adjudged and decreed that the dismissal heretofore entered in this cause be set aside, and that this cause stand for rehearing at the earliest possible day.

Done in open Court this May 25th, 1892.

CHAS. SWAYNE,
United States Judge.

Endorsed:

Circuit Court United States Northern District Florida. In Chancery. G. P. Greeley, et al., vs. R. H. Lowe, et al. Entry for Rehearing. Filed May 25th, 1892. Philip Walter, Clerk. J. R. Challen, Solicitor.

Circuit Court of the United States,
Northern District of Florida.
In Chancery.

GEORGE P. GREELEY, ET. AL.
vs.
RICHARD H. LOWE, ET. AL.

AMENDMENT TO THE BILL OF COMPLAINT.

To the Honorable Judges of said Court:

And now come complainants and by leave of the court, file this their amendment to the Bill of Complaint, and say:

1st. That from the introductory clause of said Bill they strike out the names of Eliza B. Anderson, Duncan Clinch, Jr., George Clinch, Houston Clinch, Jr., Bayard Clinch, Floyd Clinch, H. A. Clinch, Mary L. Clinch, Wm. Heyward, Clinch Heyward, Bayard Heyward, and the widow and unknown heirs of G. W. Clinch, as defendants in this cause, and also "certain unknown heirs of Alexander, John and Archibald McRae deceased," together with the allegations concerning said named parties and said unknown heirs; and add thereto—"Clarence W. Balis, is a citizen of Pennsylvania, resident of Philadelphia, Samuel C. Warner and Grace C. Warner his wife are citizens of New York, residents of Utica."

And in section 4 of said Bill, after the name of J. Houston M. Clinch, they add—"to whom letters testamentary were duly issued by the County Court of Duval County, Florida, acting as a Court of Probate." These words coming just before the words "his executor and

as his trustee, who is defendant;" and strike out the next following words, to-wit: "with the other defendants of said D. L. Clinch."

And the next paragraph of said section they hereby strike out and amend so as to read as follows, to-wit:

"The said Will of Duncan L. Clinch has been probated and filed in the County Court of Duval County, Florida."

"And the said J. Houston M. Clinch as trustee, is entitled for himself and for his cestuis que trust, to the undivided half of the South half of said Grant, which may be set off to him as said trustee, in land or in proceeds of the sale thereof; but being a large compact body the same can be set off in severalty, unless as such executor and trustee he prefers in the fulfillment of his trust to have the same sold."

"The other devisees of Duncan L. Clinch are not necessary parties, and they are stricken out as such, in order that this court may without doubt retain jurisdiction of this cause."

At the end of section XXIII they add: "That said deed is a sham and a forgery; that William Reed was never administrator of John T. Lowe, the ancestor of the grantors of complainant, and there was never any sale of said lands by any administrator, and no authority was ever conferred by any court for a sale; and such deed has been decreed absolutely null and void by the Circuit Court of Volusia County, Florida, a court of competent jurisdiction, in the action in chancery of J. Housson M. Clinch executor and trustee under the will of Duncan L. Clinch, deceased, against Lewis H. Bryan, Susan Bryan, Gadsden N. Bryan, P. N. Bryan, J. R. Hodges, W. W. Burke, and others, as complainants will show and verify at the hearing of this case, and as will fully and at large appear by reference to the record of said cause, which it is prayed the court will refer to, the same being presented to the court by certified copy whenever and as often as is called for, and said G. D. Bryan, J. D. Bryan, P. N. Bryan, Willis W. Burke, J. R. Hodges, and all claiming under them and under Susan Bennett and Lewis H. Bryan are bound by said decree."

And at end of section XXXVIII they add: "That said deeds from G. D. Bryan to S. D. Harwood and Henry Harwood, are void for uncertainty of description, and should be so construed and canceled. The Harwood Land & Improvement Company have no interest in, or claim to the premises in controversy, and this court should so hold and adjudicate."

And section 40 1-2 complainants add: "That on October 16th, 1886 the said G. D. Bryan by deed recorded in Deed Book 'I' page 82 of the records of Volusia County, attempted to convey the following described premises to the defendant Edward E. Cleveland, to-wit:"

"Beginning at a point in the North boundary of John Lowe Grant 37.76 chains Westerly from N. E. corner of said grant, running thence Westerly along said North boundary 8.44 chains; thence Southerly at

right angles 10 chains thence Easterly and parallel to the North boundary aforesaid 8.44 chains; thence Northerly at right angles 10 chains to point of beginning 8.44 acres of section 46, T. 18 R. 34. The above named point of beginning is supposed to and should be the N. E. corner of a certain tract of land containing 153.03 acres deeded by sheriff of Volusia County to Robert S. Nelson assignee of H. Swartengreen, and M. Lewis, which tract will bound the land now deeded by these presents on East side."

That the above described premises are the same mentioned in section 40 herein conveyed by G. D. Bryan per U. M. Bennett sheriff to Robert Nelson, and complainants are unable to ascertain and state what interest either the said R. S. Nelson or the said E. E Cleveland obtained by the said deeds, for that the same lands have been conveyed to Alexander St. Clair Abrams, and to various other parties long before the conveyance described herein, and the complainants aver, that the said E. E. Cleveland could not in any event take more than the one sixty-fourth (1-64) interest of said 8.44 acres, but they aver that said E. E. Cleveland has no interest whatever in said premises, and that this court should so adjudicate.

And complainants add to the 6th Interrogatory after the word "testator" the words—"and as trustee under said will," and they strike out the 7th interrogatory.

And in the first clause after the Interrogatory they add after the word "deeds" the words "and documents."

And from the last clause of the prayer they strike out from the list of defendants the names Eliza B. Anderson, Duncan L. Clinch, Jr., George Clinch, Houston Clinch, Jr., H. A. Clinch, William Heyward Clinch Heyward, Bayard, Heyward, Bayard Clinch, Floyd Clinch, Mary L. Clinch the widow and unknown heirs of G. W. Clinch deceased, certain unknown heirs of Alexander, John and Archibald McRae deceased.

And from the foot note to the Bill they strike out after the name of J. Houston M. Clinch the words and figures "and 7."

And the said Bill of Complaint as so amended the complainants adopt and re-iterate.

And they pray not to quiet title except in so far as the granting of partition, and the denial of right in severalty binds and should bind all the parties who are before the court, and sets off in severalty the property before the court and precludes repartition of the same property or any part thereof between the same parties.

And with the amendments aforesaid the complainants pray as in the Bill, and will ever pray etc.

JAMES R. CHALLEN,
Complainants' Solicitor.

Endorsed:

Circuit Court United States Northern District Florida. In Chancery. G. P. Greeley et al., vs. R. H. Lowe et al. Amendments to the Bill of Complaint. Filed by leave of court this June 13th, 1892. Philip Walter, Clerk. James R. Challen, Solicitor.

WILL OF DUNCAN L. CLINCH DECEASED.

IN THE NAME OF GOD, AMEN.

I, Duncan L. Clinch, of the County of Camden, State of Georgia being in good health of body and of sound disposing mind and memory, do make, publish and declare this my Last Will and Testament, in manner and form following, that is to say:

First. I will and decree that my executors hereinafter named shall immediately after my death or as soon thereafter as may be practicable, to sell and dispose of so much of my lands in the State of Florida, as will pay all of my just debts.

Secondly. I will and devise that my plantation on Satilla River County and State aforesaid, known as Refuge be cultivated with the slaves thereon, except such as I shall hereinafter name, for the term of ten years after my death, the net proceeds of which, after paying yearly the sum of $1400.00 to my beloved wife, Sophia H. Clinch during her natural life, be annually and equally divided between my children, to be expended or as much thereof, as is necessary, for their support and education.

Thirdly. I do further will and give to my beloved wife Sophia H. Clinch, during her natural life, the use of the house and furniture known as the "Refuge;" house, garden and grounds appertaining to it, carriage and horses; also during her natural life the use of the house, furniture and grounds, known as Lamount, in Habersham County, whenever she is disposed to occupy it. I further give to my beloved wife, during her natural life, the following named negroes; Frank (F) his wife Dolly and their daughter, Ann.

Fourthly. I give to my beloved daughter, Eliza B. Anderson, Charlotte and Willis, which I value at $1,000, to be deducted from her portion of my estate. I give to my beloved son John H. M. Clinch, my plantation in the State of Florida, known as Lang Syne on Fort Drane, which at the present low price of land, I value and charge to him at the price of $10,000, provided he should be disposed to take it at that valuation; if not it will return to my estate, and he, the said John H. M. Clinch, take an equal share with his brothers and sisters.

I give to my dear grand-daughter, E. M. C. Anderson, a negro girl named Eliza, daughter of Harry and Sarah. I further request my dear children, particularly the unmarried ones, to spend as much of their time as they can, with their fond step-mother Sophia H. Clinch. They will find her a safe friend and adviser, as she has been to me.

At the expiration of the ten years above mentioned, I will, devise and bequeath all my property, of every discription (except such as heretofore mentioned, and bequeath,) to my dear children Eliza B. Anderson, John H. M. Clinch, Mary A. Clinch, D. L. Clinch, Jr., C. M. Clinch, H. A. Clinch, N. B. Clinch and G. W. Clinch, to their heirs and assigns forever, to be equally divided amongst them, share and share alike.

I nominate, constitute and appoint Maj. Robert Anderson, U. S. Army, John H. M. Clinch, Duncan L. Clinch, Jr., executors of this my last will and testament and request them to see it executed and carried out in a spirit of kindness and affection.

In witness whereof I have hereunto set my hand and seal, this 12th, day of May, one thousand eight hundred and forty nine.

Signed, sealed, published and declared by the testator as his last will and testament in the presence of us, who, at his request, and in his presence, have hereunto set our hands as witnesses.
R. TOMPKIN.
ROBERT LANG.
GEORGE LANG.

D. L. CLINCH.
[SEAL.]

The Last Will and Testament of Gen. D. L. Clinch having been proven in open Court, upon the oath of George Lang, a subscribing witness, is ordered for record.

JOS. THOMAS, J. I. C. C. C.
Attest: GEO. W. HARDEE, J. I. C. C. C.
HENRY R. FORT, Clerk T. K. DUNHAM, J. I. C. C. C.

Recorded and examined this 8th, day of January, 1850, and I hereby certify that the executors named were duly qualified in open court.

[SEAL] HENRY R. FORT, Clerk.

STATE OF FLORIDA,
COUNTY OF DUVAL.

I, Felix Livingston, Judge of the Court of Probate, in and for said County of Duval, do hereby certify that I have this day recorded the annexed will and testament of Duncan L. Clinch, deceased, in Book of Wills, folios 16 and 17, in accordance with the order of this Court for that purpose.

Witness my name and the seal of said Court, this the 21st day of March, Anno Domini, one thousand eight hundred and fifty (1850.)

[SEAL.]

FELIX LIVINGSTON,
Judge of Probate,
Duval County.

Endorsed on back "Filed 21st of March, 1850."

STATE OF FLORIDA, }
COUNTY OF DUVAL. } By the Judge of Probate of said County.

To All to Whom this Present Shall Come; Greeting—

KNOW YE: That on the 21st day of March in the year of our Lord, one thousand eight hundred and fifty, (1850,) a certified copy of the last will and testament of Duncan L. Clinch, deceased, late of the County of Camden and State of Georgia, under the hand of Henry R. Fort, clerk of the Court of Ordinary of said County of Camden, and under the seal of said Court, together with the proof of the said last will and testament, and the certificate of record and of its admission to probate in said County of Camden and State of Georgia, was exhibited to me and admitted to record in this County and administration of all and singular, the goods and chattels, rights in credits of said deceased, was granted to John H. M. Clinch, one of the executors in and by said will, named and appointed, he having, first taken the oath and performed all other requisites required by law, he is by order of this court, and by virtue of these presents legally authorized to administer the goods, chattels, rights and credits of the said deceased, according to the tenor and effect of the said will and testament, and according to law, and he is hereby required to render a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, and appraised and return to this court, according to law, and to render a true and correct account to this court of his actings and doings yearly, and every year until his administrator is fully completed.

Witness my name and the seal of this Court, at Jacksonville, State and Connty aforesaid, this the 21st day of March, in the year of our Lord one thousand eight hundred and fifty.

[SEAL.]

FELIX LIVINGSTON,
Judge of Probate,
Duval County.

Order at Chambers, Thursday the 21st day of March, A. D. 1850.

In the matter of the Probate of the Last Will and Testament of Duncan L. Clinch, late of Camdem County, State of Georgia, deceased.

John H. M. Clinch, one of the executors in and by the last will and testament of Duncan L. Clinch, late of Camden County, State of Georgia, deceased, named and appointed, having exhibited to this

court a certified copy of said last will and testament, with the certificate of Henry R. Fort, clerk of the court of Ordinary of said County of Camden, showing that said last will and testament was duly admitted to record and to probate in said County of Camden, by the Inferior Court of said County, acting as a court of Ordinary, and under the seal of said court, and that said John H. M. Clinch; executor as aforesaid, having presented said will and testament to this court, and asked that it be and admitted to probate in this County, and the same being considered sufficiently proved. It is therefore ordered that said last will and testament be and is hereby admitted to probate in common form of law, and it is further ordered that the same be recorded in the proper book of record.

FELIX LIVINGSTON,
Judge of Probate,
Duval County.

[SEAL.]

STATE OF FLORIDA, }
COUNTY OF DUVAL. }

I, W. B. Owen, County Judge in and for said County and State, do hereby certify that the above and foregoing seven pages of typewritten matter, are true and correct copies of the original papers in this cause, as they appear on file in my office.

In witness whereof I have hereunto set my hand and official seal, at Jacksonville, said County and State, this 10th day of August, A. D. 1892.

[SEAL.]

W. B. OWENS, County Judge.
By Solan A. Adams, Clerk.

Endorsed:

United States Circuit Court Northern District of Florida. In Chancery. G. P. Greeley, et al., vs. R. H. Lowe, et al. Exhibit to Bill "R." Filed August 12th, 1892. Philip Walter, Clerk.

Circuit Court of the United States,
Northern District of Florida.
In Chancery.

G. P. GREELEY ET AL., }
vs. }
RICHARD H. LOWE ET AL. }

And now come the complainants by James R. Challen, their counsel and give notice of an appeal from the decision, findings and decrees of the court in this case; and thereupon the court fixes the bond for such appeal at the sum of $250.00 with one or more good and sufficient

sureties to be approved by the court; and it appearing that the defendants are too numerous to be conveniently recited in said bond, it is ordered that if the same be made payable to one of said defendants for himself and as trustee for the others, the said bondsmen shall be liable thereon.

Done in open court this 7th day of July, A. D. 1892.

CHAS. SWAYNE,
United States Judge.

Endorsed:

Circuit Court United States, Northern District of Florida. In [redacted]hancery. G. P. Greeley, et al., vs. R. H. Lowe, et al. Notice of [redacted]l and bond. Filed July 7th, 1892. Philip Walter, Clerk. J. R. [redacted]en, Complainants' Solicitor.

Circuit Court of the United States,
Northern District of Florida.
In Chancery.

GEORGE P. GREELEY, ET. AL.
vs.
RICHARD H. LOWE, ET. AL.

The complainants coming by their counsel and presenting to the court their bond for appeal which bond has been duly approved by the court, it is now ordered, adjudged and decreed that the said appeal may be taken and completed at any time within sixty days from the entry hereof.

Done and ordered in open court, this 8th day of July, A. D. 1892.

CHAS. SWAYNE,
Judge.

Endorsed:

Circuit Court United States, Northern District of Florida. In Chancery. G. P. Greeley, et al., vs. R. H. Lowe, et al. Entry granting appeal. Filed July 8th, 1892. Philip Walter, Clerk. James R. Challen, Solicitor.

KNOW ALL MEN BY THESE PRESENTS, That I, George P. Greeley of the County of Hillsborough, State of New Hampshire, and W. H. Smith and W. P. Shuttleworth of Evinston, Alachua county, Florida, are held and firmly bound to Richard H. Lowe for himself and as trustee for all the other appellees in the case hereinafter named, in the sum of two hundred and fifty dollars ($250.00) to be paid to the said Richard H. Lowe, for himself and as trustee as aforesaid, his executors, administrators or assigns, for which payment well and truly to be made, we bind

ourselves, our heirs, executors and administrators, firmly by these presents.

Signed and sealed this 8th day of July, A. D. 1892.

The condition of this obligation is such, that whereas the said George P. Greeley principal complainant in a certain cause pending in the Circuit Court of the United States, Northern District of Florida, in Chancery, against Richard H. Lowe, and other defendants, for the partition of real estate, has appealed from the findings and decisions of the Circuit Court aforesaid, to the Circuit Court of Appeals of the United States, in and for the 5th Judicial Circuit:

Now therefore if the said George P. Greeley shall prosecute said appeal to effect and shall pay the costs and damages taxable and taxed against him or against the appellants, to the said Richard H. Lowe for himself and as trustee for all the other appellees in said cause, and shall hold them harmless if the said appeal is dismissed, or if the said findings and decisions are affirmed, then this obligation to be void; otherwise to be in full force and virtue at law.

Attest	GEORGE P. GREELEY.	[Seal.]
F. E. ROSE.	W. H SMITH.	[Seal.]
F. B. HESTER.	W. P. SHUTTLEWORTH.	[Seal.]

STATE OF FLORIDA,
COUNTY OF ALACHUA.

W. H. Smith being first duly sworn says that he is worth the sum of one thousand dollars ($1000.00) over and above all exemptions allowed by the constitution and laws of the State of Florida.

W. H. SMITH.

Sworn to and subscribed before me
this 5th day of July A. D. 1892
F. B. HESTER,
[Seal.] Notary Public, State at Large.

STATE OF FLORIDA,
COUNTY OF ALACHUA.

W. P. Shuttleworth being first duly sworn, says that he is worth the sum of one thousand dollars ($1000.00) over and above all exemptions allowed by the constitution and laws of the State of Florida.

W. P. SHUTTLEWORTH.

Sworn to and subscribed before me
this 5th day of July, A. D. 1892.
[SEAL.] F. B. HESTER,
Notary Public State at Large.

Above bond taken and approved this 8th day of July, 1892.

CHAS. SWAYNE,
United States Judge.

Endorsed:

Circuit Court United States Northern District of Florida. In Chancery. G. P. Greeley, et al., vs, R. H. Lowe, et al. Bond and justification For Appeal. Filed July 8th, 1892. Philip Walter, Clerk. James R. Challen Complainants' Solicitor.

Circuit Court of United States
Northern District of Florida.
In Chancery.

G. P. GREELEY, ET AL.,
vs.
RICHARD H. LOWE ET AL.

Assignment of Errors.

The complainants as appellants in this cause by their counsel now come and say that in the record and proceedings of this cause there is manifest error in this, to-wit:

1st. That the court erred in sustaining the motion and pleas of certain of the defendants on the ground that this court had not jurisdiction of the parties to this cause.

2nd. That the court erred in its order and decree dismissing this cause for want of jurisdiction.

3rd. That the court erred in its final decree in this cause dismissing the Bill of Complaint.

Wherefore the said George P. Greeley and Mary P. Greeley his wife, as appellants in this cause, pray that the said orders, findings and decree of the said Circuit Court of the United States for the Northern District of Florida, may be reversed and that the said Bill may be restored, and that they may recover all things which they have lost by the findings and decree of the court, together with costs.

JAMES R. CHALLEN,
Solicitor and Counsel for
Complainants as Appellants.

Endorsed:

Circuit Court United States Northern District of Florida. In Chancery. G. P. Greeley, et al., vs. R. H. Lowe, et al. Assignment of Errors. Filed July 8th, 1892. Philip Walter, Clerk. J. R. Challen, Counsel.

United States Circuit Court, 5th Circuit Northern District of Florida.
In Chancery.

GEORGE P. GREELEY, AND WIFE,
vs.
RICHARD H. LOWE, ET AL.

Certificate of Clerk.

I, Philip Walter, Clerk of said Court, do hereby certify that the foregoing transcript pages from one to ninety-six, inclusive, is a true, full and complete record of the pleadings, proceedings and entries in said case from the files and records of the original case in this office, except the Exhibits to the Bill (the Will of D. L. Clinch only being included) the duplicate pleas, motions and demurrers the subpoenas and returns thereon, appearances and agreement to fix time for pleadings.

Witness my hand and seal of the Circuit Court, at the City of Jacksonville, in the District and Circuit aforesaid this 17th day of August, A. D. 1892, and and of our Independence the 117th year.

[SEAL.]

PHILIP WALTER, Clerk,
By JNO. S. DRIGGS,
Deputy Clerk.

Additional Transcript of Record.

UNITED STATES CIRCUIT COURT OF APPEALS.
FIFTH CIRCUIT.

No. 72.

GEO. P. GREELEY, ET UX,
Appellants.

VS.

RICHARD H. LOWE, ET AL,
Appellees.

The Lowe Grant Case.

Appeal from United States Circuit Court, Northern District of Florida. In Chancery.

James R. Challen, Counsel for Appellants.

Hamlin & Stewart, E. K. Foster, F. C. Austin, J. W. Price, Walker & L'Engle, Angus Patterson, Frank W. Pope, C. R. King, J. D. Broome, Jr., for Appellees.

Original Record Filed DEC 12 1892

Printed Copy Filed DEC 12 1892

INDEX.—Continued.

	TRANSCRIPT.	PRINT.
Subpœna,	98	
Return,	99	
Subpœna,	100	
Return,	101	
Subpœna,	102	
Return,	103	
Subpœna,	104	
Return,	105	
Appearance, Geo. Bennett and wife, J. D. Bryan and wife,	106	
" Anna Caven,	107	
" Philip E. Lowe and wife,	108	
" G. B. Burke,	109	
" T. J. Smith and wife, S. J. Hodges, G. D. Bryan and the Braddocks,	110	
" W. W. and S. F. Burke,	111	
" A. S. Goodrich,	112	
" C. R. King,	113	
" Special, Hodges, Guller, Bryan. Nelson, Smith and Bennett,	114	
Motion to Discharge service on McRae,	115	57
Demurrer Hamlin and wife, Stewart and wife,	116	
" Smith and wife,	121	60
Plea, D. B. Parce,	126	63
Demurrer, Susan Hodges,	131	65
Plea, S. J. Hodges,	135	67
Appearance, Special, and motion of Harwood Land & Improvement Co.,	143	72
" D. B. Parce,	145	
Demurrer, R. S. Nelson and wife,	146	
Appearance of Van Vorst, et al,	147	
Appearance and motion, Sophia L. Davis, et al,	150	73
Demurrer, Haml n and Stewart and wife,	151	
Exhibit A, Master's Deed,	153	
" B, Lowe to Clarke,	161	
" C, Mickler to McRae,	165	
" D, S. Lowe to J. & A. McRae,	168	
" E, Reed, adm., to Eliza Bryan,	172	
" F, P. of A., Smith, et al, to King & Bush,	175	
" F F, P. of A., Lowe to King & Bush,	181	
" G, " Ellen Miller " "	183	
" H, " Cancellation " "	186	
" I, Bryan to Burke,	189	
" J, " " Goodrich,	192	
" K, " " "	195	
" L, " " Braddock,	201	
" M, " " S. D. Harwood,	207	
" N, " " H. Harwood,	213	
" O, " " Lanford,	218	
" P, " per Sheriff to Nelson,	225	
Entry setting down demurrers, pleas, &c.,	226	74
Agreement as to Printing,	227	75
Certificate of Clerk,	228	75

CONTINUATION OF RECORD.

In Circuit Court of the United States, Northern District of Florida. In Chancery.

GEORGE P. GREELEY, ET AL, Complainants,
vs.
RICHARD H. LOWE, ET AL, Defendants.

MOTION TO DISCHARGE SERVICE.

And now on this 4th day of January, A. D. 1892, come the defendants Donald McRae, and Nancy McRae, his wife, by Hamlin & Stewart, their solicitors, appearing specially and solely for the purpose of making this their motion, and move the court to grant an order to discharge the service or attempted service herein on these defendants, upon the following grounds, to wit:

1 Because as to these defendants, non-residents of the Northern District of Florida, they are not sued in the district of the residence of either plaintiff or defendant herein, within the meaning and construction of the law, and service by publication, only does not confer jurisdiction herein.

2 Because no subpœna or order of this court, requiring these defendants to appear, plead, answer or demurer herein at at any time has been served upon these defendants, or otherwise received by them.

3 Because of other defects in said alleged service apparent upon the face of the record herein.

Hamlin & Stewart, Solicitors for Defendants.

Endorsement: In Circuit Court of the United States, Northern District of Florida. G. P. Greeley et al vs. R. H. Lowe et al. Special appearance of Donald McRae and wife. Filed January 4th, 1892, Philid Walter, clerk. Hamlin & Stewart, C. R. King & W. R. Bush, Defendants' Solicitors.

The demurrer of Arthur G. Hamlin, and Ella P. Hamlin, his wife, and Kate B. Stewart, to the Bill of Complaint of George P. Greeley and Mary P. Greeley.

These defendants by protestation not confessing or acknowledging all or any of the matters and things in said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged, demur to said bill, and for cause demurrer show.

First That said bill does not show that the cause of action therein set forth is a controversy between citizens of different States within the meaning and intent of the law.

Second That said bill does not show that the cause of action therein set forth is a controversy of which the Circuit Court of the United States for the Northern District of Florida, has jurisdiction.

Third That said bill is not brought in the district of the residence of either plaintiff or defendant in contemplation of law, in that some of defendants are alleged to be respectively residents

of several different states, other than the State of Florida as named therein.

Fourth That said bill fails to show any controversy of which the Circuit Court of the United States has jurisdiction.

Fifth That said bill puts in issue the legal title to the property described therein, in that it sets up at length the adverse title of Hamlin & Stewart, of King & Bush, of Donald McRae and others claiming under the John Archibald and Alexander McRae deed, from Ellen Mickler and Susanna Lowe, as therein set forth; of those claiming under the deed of William Reed, administrator, to Eliza Bryan, as therein set forth, and of Houston Clinch, in person and as executor and the heirs of Duncan L. Clinch, as described therein; all of which titles are shown in said bill to be titles adverse to complainant, and adverse to partition and the relief prayed for in said bill; and said bill is not a bill for partition, but is primarily and essentially a proceeding to try the legal title to the property therein described.

Sixth That said bill on its face seeks to set aside and cancel the deed of Hamlin & Stewart, made by William K. Turner, Sheriff of Volusia County, Florida, as therein fully set forth, which deed was made only could be made pursuant to the judgment of some court which judgment and deed cannot be attacked except in the court wherein the same was made, or ordered, and in no case by a bill for partition.

Seventh That said bill is multifarious in that it seeks partition, the cancellation and setting aside of deeds on various grounds therein alleged, the construction of deeds and titles, the setting aside of the contract of King & Bush, to portions of lands therein described, the establishing of an alleged trust in favor of complainant and Samuel C. Warner, one of the defendants, as against Hamlin & Stewart, and certain other defendants, as therein alleged, and the establishing and enforcement of a lien for attorneys' fees and costs alleged to have been expended by complainants; each of which alleged cause of complaint is separate and distinct and between different parties.

Eighth That said bill shows that the property sought to be partitioned in this cause cannot legally be partitioned, in that partition cannot be maintained as to property in the course of administration, as alleged in said bill.

Ninth That the interest of all parties to the suit in and to the property sought to be partitioned is neither clearly and distinctly stated in cases where the same is attempted to be defined nor are such interests alleged to be unknown, and the exact interest of none of the parties appear from the bill taken as an entirety.

Tenth That numerous conflicting legal titles, set up in a bill cannot be adjudicated in a suit brought for partition.

Eleventh That said bill fails to show that the complainant is entitled to the partition of the land therein described, or the other relief prayed.

Twelfth That said bill shows that Eliza Anderson, a material party thereto, is a citizen and resident of the District of Colum-

bia, and this court has no jurisdiction of controversies between citizens of the several States and a citizen of the District of Columbia.

Thirteenth That said bill fails to reveal a controversy in which, in contemplation of law, the matter in dispute exceeds, exclusive of interest and costs, the sum of value of $2,000.

Fourteenth That said bill fails to show any legal right title or interest in Mary P. Greeley, one of the complainants therein, and she is improperly joined.

Fifteenth That said bills fails to show any legal or equitable right title or interest in said Ella P. Hamlin and Kate B. Stewart, of these defendants, or in any married woman defendants herein, who is not shown to possess some interest in property sought to be partitioned, in her own right, and other than a mere incohate right of dower, and said Ella P. Hamlin and Kate E. Stewart, and all such married women, are improperly joined.

Sixteenth That said bill does not contain in the introductory part thereof, the names, places of abode, and citizenship of all the parties plaintiff and defendant as required by the rule of this court.

Seventeenth The prayer for process of subpœna in said bill contains the names of other parties defendant than those named in the introductory part thereof.

Eighteenth That said bill is defective in that shows interests in and seeks relief against parties not named as defendants therein, and seeks the construction and cancellation of, and the determination of interest under, deeds which are not set up in said bill.

Nineteenth That said bill is directed against certain material parties defendant, whose names and residences are alleged as unknown, without any authority of law in that behalf, and the rights and interests of those of other parties cannot be adjudicated by this court under bill thus brought.

Twentieth That said bill shows that John W. Lowe died in A. D. 1850, while it also alleges that the U. S. Patent under which complainants claim title was issued to him in A. D. 1882.

Twenty-first That said bill shows that the estate of various parties therein named have never administered upon, without the allegation that all indebtedness against the same has been paid, and as to defendants claiming title by descent or device under such estate this bill cannot be maintained, or any of the property partitioned.

Twenty-second That said bill improperly and illegally seeks to enforce a lien against the property involved, in behalf of complainants for attorneys fees, court costs, and other like expenses alleged by them to have been expended of their own motion.

Wherefore, and for divers other good causes of demurrer appearing in said Bill of Complaint these defendants demur to the said bill and to all the matters and things therein contained, and pray judgment of this Honorable Court, whether they shall be compelled to make any further or other answer to the said bill

and they pray to be dismissed with reasonable costs in behalf sustained.

Hamlin & Stewart, Solicitors for Defendants.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

Hamlin & Stewart, Solicitors for Defendants.

State of Florida, }
County of Volusia. }

Personally appeared before me Arthur G. Hamlin, who being duly sworn says that he is one of the defendants above named, and that the foregoing demurrer is not interposed for delay.

Arthur G. Hamlin.

Subscribed and sworn before me this 2nd day of January A. D. 1892.

[Seal]. Silas B. Wright, Notary Public.

Endorsement: In Circuit Court Northern District of Florida. In Chancery. G. P. Greeley, et al vs. Richard Lowe, et al. Demurrer of Arthur G. Hamlin, Ella P. Hamlin and Kate B. Stewart. Filed January 4th, 1892. Philip Walter, Clerk. Hamlin & Stewart, Attorneys for Defendants.

The demurrer of Thomas J. Smith, and Bessie Smith, his wife, to the Bill of Complaint of George P. Greeley and Mary P. Greeley.

These defendants, by protestation not confessing or acknowledging all or any of the matters and things in said complainant's bill contained to be true in manner and form as the same are therein set forth and alleged, demur to said bill, and for causes of demurrer shows.

First That said bill does not show that the cause of action therein set forth is a controversy between citizens of different States within the meaning and intent of the law.

Second That said bill does not show the cause of action herein set forth is a controversy of which the Circuit Court of the United States for the Northern District of Florida, has jurisdiction.

Third That said bill is not brought in the district of the residence of either plaintiff or defendant in contemplation of law, in that some defendants are alleged to be respectively residents of several different States, other than the State of Florida, and in other districts than the Northern District of Florida, as named therein.

Fourth That said bill fails to show any controversy of which the Circuit of the United States has jurisdiction.

Fifth That said bill puts in issue the legal title to the property described therein, in that it sets up at length the adverse title of Hamlin & Stewart, of King and Bush, of Donald McRae, and others claiming under the John Archibald and Alexander McRae deed, from Ellen Miller and Susanna Lowe, as therein set forth, of those claiming under the deed of William Reed, administrator, to Eliza Bryan, as therein set forth, and of Houston Clinch, in person and as executor and the heirs of Duncan L. Clinch, as

described therein; all of which titles are shown in said bill to be titles adverse to complainant, and adverse to partition and the relief prayed for in said bill, and said bill is not a bill for partition but is primarily and essentially a proceeding to try the legal title to the property therein described.

Sixth That said bill on its face seeks to set aside and cancel the deed of Hamlin & Stewart, made by William K. Turner, Sheriff of Volusia County, Florida, as therein fully set forth, which deed was made and only could be made pursuant to the judgment of some court, which judgment and deed cannot be attacked except in the court wherein the same was made or ordered, and in no case by a bill for partition.

Seventh That said bill is multifarious in that it seeks partition, the cancellation and setting aside of deeds on various grounds alleged therein, the construction of deeds and titles, the setting aside of the contract of King & Bush, to portions of lands therein described, the establishing of an alleged trust in favor of complainants and Samuel C. Warner, one of the defendants, as against Hamlin & Stewart, and certain other defendants, as therein alleged, and the establishing and enforcement of a lien for attorneys' fees and costs alleged to have been expended by complainant; each of which alleged cause of complaint is separate and distinct and between different parties.

Eighth That said bill shows that the property sought to be partitioned in this cause cannot legally be partitioned in that partition cannot be maintained as to property in the course of administration as alleged in said bill.

Ninth That the interest of all parties to the suit in and to the property sought to be partitioned is neither clearly and distinctly stated in cases where the same is attempted to be defined, nor are such interests alleged to be unknown, and the exact interest of none of the parties appear from the bill taken as an entirety.

Tenth That numerous conflicting legal titles, set up in a bill cannot be adjudicated in a suit brought for partition.

Eleventh That said bill fails to show that the complainant is entitled to the partition of the land therein described, or the other relief prayed.

Twelfth That said bill shows that Eliza Anderson, a material party thereto is a citizen and resident of the District of Columbia, and this court has no jurisdiction of controversies between citizens of the several States and a citizen of the District of Columbia.

Thirteenth That said bill fails to reveal a controversy in which, in contemplation of the law the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000.

Fourteenth That said bill fails to show any legal right, title or interest in Mary P. Greeley, one of the complainants therein, and she is improperly joined.

Fifteenth That said bill fails to show any legal or equitable title or interest in said Bessie Smith, of these defendants, or in

any married woman defendant herein who is not shown to possess some interest in the property sought to be partitioned, in her own right, and other than a mere incohate right of dower, and said Bessie Smith and all such married women are improperly joined.

Sixteenth That said bill does not contain in the introductory part thereof the names, places of abode and citizenshship of all the parties plaintiff and defendant as required by the rule of this court.

Seventeenth The prayer for process of subpœna in said bill contains the names of other parties defendant than those named in the introductory part thereof.

Eighteenth That said bill is defective in that it shows interests in and seeks relief against parties not named as defendants therein, and seeks the construction and cancellation of, and the determination of interests under deeds which are not set up in said bill.

Nineteenth That said bill is directed against certain material parties defendants, whose names and residences as unknown, without any authority of law in that behalf, and the rights and interests of those of other parties cannot be adjudicated by this court under a bill thus brought.

Twentieth That said bill shows that John W. Lowe died in A. D. 1850, while it also alleges that the U. S. Patent under which complainants claim title was issued in A. D. 1882.

Twenty-one That said bill shows that the estate of various parties therein named have never been administered upon without allegation that all indebtedness against the same has been paid, and as to defendants claiming title by descent or devise under such estate this bill cannot be maintained, or any of the property partitioned.

Twenty-two That said bill improperly and illegally seeks to enforce a lien against the property involved, in behalf of complainants, for attorneys' fees, court costs, and other like expenses alleged by them to have been expended for their own motion.

Wherefore, and for divers other good causes of demurrer appearing in said Bill of Complaint, these defendants demur to the said bill and to all the matters and things therein contained, and pray the judgment of the Honorable Court, whether they shall be compelled to make any further or other answer to the said bill and they pray to be dismissed with their reasonable costs in this behalf sustained.

F. C. Austin, Hamlin & Stewart, Attorneys for Defendants.

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

Hamlin & Stewart, F. C. Austin, Attorneys for Defendants.

State of Florida, }
County of Hillsborough. }

Personally appeared before me Thomas J. Smith, who being duly sworn says that he is one of the defendants above named, and that the foregoing demurrer is not interposed for delay.

Thomas J. Smith.

Subscribed and sworn to before me this 29th day of January, A. D. 1892.

[Seal]. J. L. Young, Notary Public.

Endorsement: In Circuit Court of the United States, Northern District of Florida. George P. Greeley et al, complainants, vs. Richard H. Lowe et al, demurrer of J. S. Smith et al. Filed February 1st, 1892. Philip Walter, Clerk. F. C. Austin, Defendants' Solicitor.

The plea of David B. Parce, defendant to the Bill of Complaint of George P. Greeley et al, complainant.

This defendant, by protestation, not confessing, acknowledging all or any of the matters and things in said complainant's said bill mentioned or to be true in such manner and form as the same are therein and thereby set forth and alleged, both plead thereto, and for plea says:

For a first plea to the jurisdiction of this court defendant says that the cause of action set forth in said bill is not a controversy between citizens of different States, and this court has not jurisdiction thereof, for that this defendant is now and was at the time of the filing of said bill, and ever has been a citizen of the State of New York, and a resident of the Town of Otselic, in the County of Chenango, in said State, and not a resident or citizen of the State of Florida, as alleged in said bill; that his co-defendant, Samuel C. Warner, is now and was at the time of the filing of said bill a resident and citizen of Utica, in the State of New York, that his co-defendant Mary B., Frederick B. Van Vorst, her husband, are now and were at the time of the filing of said bill citizens of Newark, in the State of New York, that this defendant claims to own and does own by good and perfect title the following described land set forth and described in said bill being a portion of the 10,016 acres of land known as the John Lowe grant, and sought by said bill to be partitioned; viz:

A certain piece or parcel of land lying and being in the County of Volusia and State of Florida, beginning at a point in the John Lowe grant, Township 19, south of Range 34 East, in the south line of land owned by S. J. Hodges, and one mile westerly from the east boundry of said grant, running thence south 11 degrees east, 29.42 chains, thence westerly at right angles 34 chains; thence northerly at right angles 29.42 chains; thence easterly along S. J. Hodges' line to the point of beginning 34 chains; the same enclosing and being 100 acres of land of the John Lowe grant, situated in Township 19, South of Ronge 34 East, as aforesaid, that this defendant's title to said land is by purchase at foreclosure of a certain mortgage duly executed and delivered to him by Gadsden D. Bryan and wife, on the 31st day of October, 1887, and then duly recorded, and the sa d Bryan claiming and having title by purchase from his brothers and sisters, and by descent from his father and his mother, Eliza Bryan, who in turn claimed title to all of said land under a certain deed bearing the date Sept. 27, 1866, A. D. from William Reed, administrator of the estate of said John

Lowe, deceased, all of which more fully appear as set forth in said bill; that said defendant, Samuel C. Warner, owns, or claims to own, a certain undivided interest in and to the whole of said grant, including that owned by this defendant, and claiming title thereto under deeds of certain of the alleged heirs of said John Lowe, deceased, and Susan Lowe, his wife, also deceased, as more fully appears from said bill; that said defendant, Mary G. Van Vorst, owns or claims to own, a certain undivided interest in and the whole of said grant including that owned by this defendant by inheritance from one John McRae, deceased, under and pursuant to a certain deed of conveyance alleged to have been made by Susan Lowe, now deceased, widow of said John Lowe, to Alexander and John McRae, the said Susan at the time of said conveyance owning or claiming to own an undivided one-half interest in and to all of said grant, as a granancial right, as more fully appears from said bill.

That the several titles of this defendant, and the defendant Samuel C. Warner, and defendant Mary G. and Frederick D. Van Voorst, are wholly antagonistic and adverse one to the other in that if said administrator's deed conveyed a good and perfect title, or any title under which said Eliza Bryan and her grantees or heirs have claimed and held adverse possession since the date of said deed to all of said grant (all of which the defendant alleges to be true), the said heirs of the said John Lowe, deceased, had no title whatever to convey to said defendant, Samuel C. Warner and his alleged title to said grant must in consequence thereof fail, and is utterly void; and the said Susan Lowe, deceased, had no title whatever to convey to said Alexander and John McRae, and the title of said defendant, Mary G. and Frederick B. Van Voorst, must in consequence thereof fail and is utterly void in that if the said title of said defendants, Mary G. and Frederick B. Van Voorst, is good and valid it, to the extent thereof, conflicts with and detracts from the interest in said grant of this defendant and of said defendant, Samuel C. Warner, who claims said ganancial right or interest of said Susan Lowe, deceased, by virtue of his alleged conveyances from the heirs of said John and Susan Lowe, deceased, as aforesaid, and that said defendant, Samuel C. Warner, claims title to said grant under joint deeds with complainant, George P. Greeley, and not otherwise, and the interest of complainant, George P. Greeley, and of said defendant, Samuel C. Warner, are identical as to the source of their title, and as to the controversy set forth in said bill.

Second For a second plea to the jurisdiction of this court this defendant says that this proceeding is an original civil suit or proceeding brought in the Circuit Court of the United States for the Northern Distr ct of Florida, and such is not brought in the district of the residence of either of the plaintiff or of this or any other defendants in conteplation of law and this court has not jurisdiction of this cause or the parties thereto, for that plaintiff or complainant is and was at the beginning of this suit a resi-

dent and citizen of Nashua, in the State of New Hampshire, and this defendant is and was at the beginning of this suit a citizen and resident of the town of South Otselie, in the County of Chenango, in the State of New York, while the residence and citizenship of many others of the defendants to said bill is in other districts of the United States Circuit Court than the Northern District of Florida, as more fully appears from said bill.

All of which matters and things contained in the three foregoing pleas this defendant avers to be true, and pleads the same to the whole of said bill, and as to the jurisdiction of this court and demands the judgment of this Honorable Court whether he ought to be compelled to make any answer to the said Bill of Complaint, and pray to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

John D. Broome, Jr., by E. K. Foster,
Solicitor for D. B. Parce, Defendant.

This is to certify that in my opinion the foregoing plea is well founded in point of law.

John D. Broom, Jr., by E. K. Foster,
Solicitor for D. S. Parce, Defendant.

State of Florida, }
County of Volusia. }

Personally appeared before me David B. Parce, who being duly sworn says that he is one of the defendants in the above entitled cause, that he has read the foregoing plea and knows the contents thereof and that the same is true except as to matters alleged on information and belief, and as to those he believes them to be true. David B. Parce.

Subscribed and sworn to before me this 23rd day of January. A. D. 1892.

[Seal]. John D. Broome, Jr.,
Notary Public, State of Florida.

Endorsement: Filed January 26th, 1892. Philip Walter, Clerk.

The demurrer of Mary Susan Hodges to the Bill of Complaint of George P. Greeley and Mary P. Greeley.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complananants' bill contained to be true in such manner and form as the same are therein set forth and alleged, demur to said bill and for causes of demurrer show:

First That said bill sets up a controversy which is not a controversy between citizens of different States, in that material parties to said controversy and to the relief sought, and whose interests are antagonistic, are citizens of the same State, to wit: citizens of the State of New York, having interests antagonistic each to the other, and citizens of the State of Florida, having interests antagonistic each to the other.

Second That said bill is not filed and the cause of action brought in the district of the residence of either plaintiffs or de-

fendants in contemplation of law, in that some of the defendants are alleged to be respectively citizens and residents of several different States, other than the State of Florida, as appears from said bill.

Third That said bill shows that Eliza B. Anderson, a material party thereto, is a citizen and resident of the District of Columbia, and this court has no jurisdiction of controversies between citizens of the several States and a citizen of the District of Columbia.

Fourth That said bill fails to reveal a controversy in which, in contemplation of law, the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

Fifth That said bill fails to show any legal right, title or interest in Mary P. Greeley, one of the complainants therein, and she is improperly joined.

Sixth That said bill fails to show any legal or equitable right, title or interest in Mary Susan Hodges, one of the defendants, or in any married woman defendant herein, who is not shown to possess some interest in the property sought to be partitioned, in her own right, other than a mere incohate right of dower, and said Mary Susan, and all such married women are improperly joined.

Seventh That said bill does not contain in the introductory part thereof; the names, places of abode and citizenship of all the parties plaintiffs and defendants as required by the rule of this court.

Eighth The prayer for process of subpœna in said bill contains the names of other parties defendant than those named in the introductory part thereof.

Ninth That said bill is defective in that it shows interests in and seeks relief against parties not named as defendants therein, and seeks the construction and cancellation of and the determination of interests under deeds which are not set up in said bill.

Tenth That said bill is directed against certain material parties defendant whose names and residences are alleged as unknown, without any authority of law in that behalf, and the rights and interests of those of other parties cannot be adjudicated by this court under a bill thus brought.

Eleventh That said bill shows that John W. Lowe died in A. D. 1850, while it also alleges that the U. S. Patent under which complainants claim title was issued in to him A. D. 1882.

Twelfth That said bill shows that various interests in the property sought to be partitioned cannot legally be partitioned, in that partition cannot be maintained as to property in the course of administration as alleged in said bill.

Thirteenth That said bill shows that the estates of various parties therein named have never been administered upon, without allegations that all indebtedness against the same has been paid, and as to defendants claiming title by descent or devise under such estates this bill cannot be maintained, or any of the property partitioned.

Fourteenth That said bill is multifarious.

Fifteenth That said bill cannot be maintained in that it puts in issue the legal title to the property involved, and shows a case of which a court of equity has no jurisdiction.

Sixteenth That said bill improperly and illegally seeks to enforce a lien against the property involved, in behalf of complainants for attorneys' fees, court costs and other liko expenses alleged by them to have been expended of their own motion.

Seventeenth That said bill fails to set forth a case in which a court of equity can decree the relief, or any relief.

Eighteeenth That said bill fails to show any controversy of which the Circuit Court of the United States has jurisdiction.

Wherefore, and for divers other good causes of demurrer appearing in said Bill of Complaint, this defendant demurrers to the said bill, and to all the matters and things therein contained, and prays the judgment of this Honorable Court whether she shall be compelled to make any further or other answer to the said bill, and she prays to be dismissed with her reasonable costs in this behalf sustained. F. C. Austin, Solicitor for Defendant.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

F. C. Austin, Solicitor for Defendant.

State of Florida, }
County of Volusia. }

Personally appeared before me Mary Susan Hodges, who being duly sworn says that she is the defendant above named, and that the foregoing demurrer is not interposed for delay.

Mary S. Hodges.

Subscribed and sworn to before me this 2nd day of January, A. D. 1892.

[Seal]. Arthur G. Hamlin, Notary Public.

Endorsement: In Circuit Court of the United States, Northern District of Florida. George P. Greeley, et al, vs. Richard H. Lowe, et al, demurrer of Mary Susan Hodges. Filed January 4th, 1892. Philip Walter, Clerk. F. C. Austin, Attorney for Defendant.

The plea of Shepard J. Hodges to the Bill of Complaint of George P. Greeley, et al, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's bill mentioned, to be true in such manner and form as the same are therein and thereby set forth and alleged, doth plead thereto, and for plea says:

First For first plea to the jurisdition of this court defendant says that the cause of action set forth in said bill is not a controversy between citizens of different States, and this court has not jurisdiction thereof, for that complainant, G. P. Greeley, who is a citizen of New Hampshire, and defendant, Samuel C. Warner, who is and was at the time of the filing of said bill a citizen of New York, obtained and holds title to undivided interests in the

property in said bill sought to be partitioned under joint deeds from the alleged heirs of John T. Lowe and Susan Lowe, his wife, both deceased, or from their grantees, while defendant, David B. Parce, who is and was at the time of the filing of said bill a citizen of New York and not a citizen of Florida as alleged in said bill, obtained and claims title to a definite portion of said property, described by metes and bounds, under and pursuant to a certain deed made and executed by the administrator of the estate of John T. Lowe, deceased, and the interests of said Warner and Parce are adverse, as more fully appears from said bill, and the controversy involved in the matters and things set forth in said bill, as to said Warner and Parce is a controversy between citizens of the same State, to wit, the State of New York; for that defendants to said bill, Mary C. Van Vorst, and Frederick B. Van Vorst, who are and were at the time of filing said bill citizens of the State of New York, obtained and claim title by inheritance to an undivided portion of said property sought to be partitioned under and pursuant to a certain deed of conveyance made to Alexander and John McRae, deceased, (the said John being ancestor of said Mary C. Van Vorst), by said Susan Lowe, widow of said John T. Lowe, in the life time of Susan who claimed to own an undivided one-half of all said property sought to be partitioned, while said complainant and defendant, Samuel C. Warner, a citizen of New York as aforesaid, claims to possess and own under joint titles obtained from the heirs of said Susan the same interest, or an undivided portion thereof, as claimed by said Mary C. Van Vorst and her husband, and the interest of said Mary C. Van Vorst and husband and said S. C. Warner are adverse, as more fully appears from said bill, as are also the interests of said Mary C. Van Vorst and husband and of said David B. Parce in that said Parce claims that the interest of said Susan Lowe was that of a dower interest in said property rather than an undivided half therein, pursuant to the laws of Spain as set forth in said bill, and the controversy involved in the matters and things set forth in said bill as to said Mary C. Van Vorst and husband, and said Warner and said Parce are respectively controversies between citizens of the same State, to wit: the State of New York; for that this defendant, Shepard J. Hodges, and together with defendants to said bill, Mary Susan Hodges, A. St. Clair-Abrams and wife, P. N. Bryan and wife, Joseph D. Bryan, Jr., and wife, George Bennett and wife, Marion Bennett (a minor), Anna Caven in person and as administratrix, Albert S. Goodrich, Charles Goodrich and wife, W. A. Goodrich, N. M. Goodrich, A. C. Goodrich and wife, Francis R. Goodrich, Elizabeth Goodrich, Georgianna Bryan, Henry Guller and wife, Robert S. Nelson and wife, Isaac A. Stewart and wife, Henderson Williams, Carrie E. Jackson and husband, Henry Burke, Willis W. Burke, Jr., Mary Green and husband, Granville B. Burke, Edward E. Cleveland, Harwood Land Company, and Charles L. Mitchell, who are and were at the time of said bill was filed citizens of the State of Florida, obtained and claimed title to their several respective interests in said property by purchase and

descent under and pursuant to said deed from William Reed, administrator of the estate of John T. Lowe, deceased, to Eliza Bryan, bearing date the 27th day of September, A. D. 1885, and which deed conveyed the entire property sought by said bill to be partitioned, which more fully appears from a copy thereof and the allegations contained in said bill, and further severally claim to have been, either themselves or by their respective grantors or ancestors, in actual adverse possession of all of said property for more than seven years, while defendants, Arthur C. Hamlin and wife, W. R. Bush, C. R. King, Walter A. Drake, Hezekiah Foster, Sarah Foster (minors), James H. Foster, individually and as guardian for said minors, Mary F. Johns and husband, Philip E. Lowe and wife, Thomas L. Smith and wife, who are and were at the time said bill was filed also citizens of the State of Florida, claim title to undivided interests in all of the property so sought to be partitioned as heirs or through and under heirs of said John T. Lowe and Susan Lowe, deceased, either by descent or purchase, and also deny the validity of said deed from William Reed, administrator, to Eliza Bryan and any and all title derived there under, and claim to have been and remained, by themselves or their co-tenants, grantors, or ancestors, in possession of said property in such manner as to preclude any adverse possession on the part of all those claiming title under said administrator's deed, and the interests of those claiming under said administrator's deed and those claiming under said heirs are adverse, and the controversy in that behalf is between citizens of the same State, to wit: the State of Florida, for that the said defendant, Walter A. Drake, a citizen of Florida, as aforesaid, also claims title under and pursuant to a certain deed, alleged to have been made by said Susan Lowe in her life time to Alexander and John McRae, by purchase from the heirs of said John McRae, deceased, adversely to all said defendants claiming under said administrator's deed, and also, adversely to said defendants claiming as heirs under the heirs of said John T. and Susan Lowe, deceased, also citizens of the State of Florida, as aforesaid, who deny the validity and execution of said deed by said Susan, all of which more clearly appears from said bill, and the controversy in that behalf is a controversy between citizens of the same State, to wit: the State of Florida; and that the defendants, the widow and unknown heirs of G. W. Clinch, deceased, who are alleged in said bill to be citizens of the said State of Florida, claim title by descent, to an undivided interest in the entire south half of the property sought to be partitioned, under and pursuant to a deed to said south half, alleged to have been executed in the life time of said John T. Lowe to George I. F. Clarke, and subsequently conveyed by said Clark to Duncan L. Clinch, the ancestor of said defendants, and said defendants allege that the interest in said conveyed property of Susan Lowe, if she was living at the time of the execution of said alleged deed from John T. Lowe to George I. F. Clarke, in which said Susan did not join, was a dower interest and not an undivided half interest under the Spanish law, and

such undivided interest of said defendants, whatever may have been the title of Susan Lowe thereto, and also as to the extent of said Susan Lowe's interest, is adverse to the interest of all these defendants, also citizens of the State of Florida, who claim under said administrator's deed, which purports to convey all said property sought to be partioned, or as to the heirs or under those claimed the heirs of John T. Lowe and Susan Lowe, deceased, who claim the interest of said Susan was an undivided half in and to all said property, or as to Walter A. Drake, who claims an undivided interest as well in the south half as the north half of said entire property under and pursuant to a deed alleged to have been executed by said Susan in her life time to Alexander and John McRae, as aforesaid, and such several controversies are controversies between citizens of the same State, to wit: the State of Florida, of which this Honorable Court has no jurisdiction. All of said parties complainant and defendant mentioned herein are material parties, and necessary to the full and complete adjudication of the matters and things set up and the relief prayed for in said bill.

For a second plea to the jurisdiction of this court this defendant says that the cause of action set forth in the bill is not a controversy between citizens of different States, within the construction and meaning of the law, in that one of the defendants, Eliza B. Anderson, a material party to said controversy, is now and was at the time the said bill was filed a citizen of the District of Columbia, and as between said Eliza a citizen of the District of Columbia, and this defendant and a citizen of Florida, and complainants, citizens of New Hampshire, and other parties to said bill, citizens of other States, there is a controversy as to her title and the extent thereof, of which this court has no jurisdiction.

Third For a third plea to the jurisdiction of this court this defendant says that this court has no jurisdiction of this cause, in that it is not brought in the district of the residence of complainants, George P. Greeley and wife, who are and were at the time said bill was filed, citizens of the State of New Hampshire or of defendants, Joseph Rosenheim, J. Houston, M. Clinch, Duncan Clinch, Jr., George Clinch, Houston Clinch, Jr., and H. A. Clinch, who are and were at the time of the filing of said bill citizens of the State of Georgia, Eliza B. Anderson, who is and was at the time of filing of said bill a citizen of Washington, District of Columbia; Bayard Clinch and Floyd Clinch, who and were at the time said bill was filed citizens of the State of Illinois; Mary L. Clinch, William Heyward, Clinch Heyward and Bayard Heyward, who are and were at the time of said bill citizens of South Carolina, Sophia L. Davis and husband, Susan R. Davis and husband, Sarah Lowe, Lucy Lowe, Richard H. Lowe, Robert J. Lowe Ella Lowe, Carroll Lowe, Manning Lowe, Fannie Lowe, Jr., Marie Lowe (minor), Fannie Lowe, who are and were at the time of the filing of said bill citizens of the State of Alabama; W. T. Purviance, Caroline A. Drake and husband, Margaret E. Gurgannus,

Maria Makepeace and hnsband, Margaret H. Markham and husband, Martha C. Rotha and husband, Alexander Purviance and Gerald Purviance, and certain unknown heirs of Alexander and Archibald McRae, who are and were at the time of the filing of said bill citizens of the State of Texas, Colin McRae and wife, Donald McRae and wife, Kate A. Vink and husband, Annie P. Aldeman and husband, John McRae, William McRae, Roderick McRae, Mary A. Grace and husband, Sallie McRae Chater, R. Dunas Chater, her husband, George McRae, Donald McRae and wife, certain unknown heirs of Alexander and Archibald McRae, who are and were at time of the filing of said bill citizens of the State of North Carolina; Mary G. Van Vorst and Frederick B. Van Vorst, who are and were at the time of the filing of said bill citizens of the State of New York; Sallie McRae, Caroline D. McRae, George U. McRae, Frederick D. McRae and Walter C. McRae, who are and were at the time of the filing of said bill citizens of the State of New Jersey; Christina Williams and Jackson Williams, who are and were at the time of the filing of said bill citizens of the State of Mississippi.

Fourth For a fourth plea herein this defendant says that on the 21st day of December, A. D. 1889, Donald McRae and others, all of whom are defendants herein, exhibited their Bill of Complaint in Circuit Court of the Seventh Judicial Circuit of Florida in and for Volusia County on the Chancery side thereof, against this defendant, George P. Greeley, complainant, herein, and against other defendants herein alleging a cause of action by and between substantially the same parties as to the complainants present bill mentioned, for the purpose of obtaining a decree for the partion of the very same real estate in complainants present bill mentioned and none other, and praying relief against this defendant, and others, in the same manner and to the same effect as the complainants now pray by their present bill; and this defendant and said complainant herein, George P. Greeley, and all other defendants to said former bill, were duly served with process and these defendants and said Greeley appeared and put in their several answers to the said former bill, and all other defendants thereto plead or suffered default in due form of law, and complainants therein replied to such pleadings, and the several proceedings in the said former cause remained depending in said State Court until on or about the 2nd day of January, A. D. 1891, when said George P. Greeley, defendant therein and complainant herein, filed a petition in this court for the removal of said former cause from said State Court to this court, and also filed a certified copy of the record therein, and by order of Honorable Charles Swayne, presiding judge of this court, bearing date the 2nd day of January, A. D. 1891, said former cause was removed to this court and ordered docketed herein, motions were duly made to remand the same to said State Court but have never been argued, and said former cause now remains depending and as of record in this Honorable Court, the said cause being yet undetermined and undismissed.

All of which matters and things contained in the four foregoing pleas this defendant avers to be true, and pleads the same to the whole of said bill, and as to the jurisdiction of this court and demands the judgment of this Honorable Court whether he ought to be compelled to make any answer to said Bill of Complaint, and prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

F. C. Austin, Solicitor for Shepard J. Hodges, Defendant.

This is to certify that in my opinion the foregoing plea is well founded in point of law.

F. C. Austin, Solicitor for Shepard J. Hodges, Defendant.

State of Florida, }
County of Volusia. }

Personally appeared before me Shepard J. Hodges, who being duly sworn says that he is one of the defendants in the above entitled cause, that he has read the foregoing plea and that the same is not interposed for delay, and is true in point of fact.

S. J. Hodges, Defendant.

Subscribed and sworn to before me this 2nd day of January. A. D. 1892.

[Seal]. Silas B. Wright, Notary Public.

Endorsement: In Circuit Court of the United States, Northern District of Florida. George P. Greeley, et al, vs. Richard H. Lowe, et al. Plea of S. J. Hodges, Defendant. Filed January 4th, 1892. Philip Walter, Clerk. F. C. Austin, Attorney for Defendant.

Comes now the Harwood Land and Improvement Company, by Walker & L'Engle, its counsel and solicitors, and enters this, its special appearance in said court, in the said cause, for the purpose solely of moving the court to quash the process in said cause as to this defendant, and to set aside the service thereof upon this defendant, on the following grounds:

First Said subpœna, as appears by the copy thereof, served upon this defendant, fails to show who are the complainants therein. The only person named being the said George P. Greeley.

Second Said subpœna states that the bill was filed in said cause is for partition of real estate, but fails to describe the real estate sought to be partitioned.

Third Said subpœna shows, upon its face, that it is an alias; yet no other subpœna, in said cause, has been issued as to this defendant.

Walker & L'Engle,
Counsel and Solicitors for said Defendant.

Endorsement: United States Circuit Court, Northern District of Florida. George P. Greeley, et als, vs. Francis R. Goodrich, et als. Special appearance and motion to quash. Filed February 1st. 1892. Philip Walter, Clerk. Walker & L'Engle, Solicitors for the Harwood Land and Improvement Company.

United States of America, Northern District of Florida. The President of the United States of America, to Francis R. Goodrich, Elizabeth Goodrich, James M. Foster, as guardian of Heze-

kiah Foster and Sarah Foster, minors over 14 years of age, Albert S. Goodrich, D. B. Parce, Marion Parce, his wife, Henry Burke, Charles R. King and the Haywood Land and Improvement Company:

We command you, and every of you, that you appear before the Judges of the Circuit Court of the United States of America, for the Fifth Circuit and Northern District of Florida, at Jacksonville, in said District, on the first Monday, being the first (1st) day of February next, to answer to a bill of complaint exhibited against you by George P. Greeley, et al, for partition of real estate, and filed in the clerk's office of said court, and then and there to receive and abide by such judgment and decree as said court shall have considered in this behalf. And this you are not to omit, upon pain of judgment by defuault be ng pronounced against you.

To the Marshal of the United States, to execute and return.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States and the Seal of this court, at the City of Jacksonville, in said district, this 16th day of December A. D. 1891. Philip Walter, Clerk.

James R. Challen, Solicitor for Compl't.

Memorandum: The above named defendants are notified that unless they shall enter their appearance in the clerk's office of said court, at Jacksonville aforesaid, on or before the day to which the above is returnable, the complaint will be taken against them as confessed and a decree entered accordingly.

Edmund C. Weeks, U. S. Marshal, Philip Walter,
By L. R. Bradley. Clerk.

And now on this 4th day of January, A. D. 1892, comes the defendants, Sophia L. Davis, Nicholas Davis, her husband, Susan R. Davis, DeWitt C. Davis, her husband, Sarah Lowe, and Richard H. Lowe, Robert J. Lowe, and Fannie Lowe, individually and as guardian of Ella Lowe, Carroll Lowe, Manning Lowe, and Fannie Lowe, Jr., and Mary Lowe (minors), by Hamlin & Stewart and G. R. King and W. R. Bush, their solicitors, appearing specially and solely for the purpose of making this their motion, and move the court to grant an order to discharge the service or attempted service herein on these defendants, and to dismiss the Bill of Complaint herein upon the following grounds, to wit:

First Because it does not appear from the record herein that this Honorable Court has jurisdiction of these defendants, or other defendants, non-residents of the Northern District of Florida, or that jurisdiction has been or can be gained over such defendants by publication made herein, for the purpose set forth and relief prayed for in the bill, and between the parties named herein.

Second Because no subpœna or order of this court requiring these defendants to appear, plead, answer, or demur at any time. has been served upon these defendants or otherwise received by them.

Third Because said bill seeks to obtain a decree in personam

against these defendants, and these defendants have not been personally served with process, nor have they been served with any process by publication sufficient to warrant any such decree as is prayed for in said bill.

Fourth Because the record herin reveals no controversy that is between citizens of different States, w thin the meaning and construction of the law, or a controversy otherwise within the jurisdiction of the Federal Courts.

Fifth Because said record fails to reveal a controversy in which in contemplation of law the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars.

Sixth Because the record shows a controversy between citizens of several different States, and a citizen and resident of the District of Columbia, who is shown to be a material party to such controversy.

Seventh Because of other defects in said alleged service apparent upon the face of the record herein.

Hamlin & Stewart, C. R. King & W. R. Bush,
Solicitors for Defendants.

Endorsement: In Circuit Court of the United States, Northern District of Florida. Special appearance of Sophia L. Davis. G. P. Greeley, et al, vs. R. H. Lowe, et al. Filed January 4th, 1892. Philip Walter, Clerk. Hamlin & Stewart, C. R. King & W. R. Bush, Defendants' Solicitors.

And now come complainants this 11th January, 1892, and set down for hearing the demurrer of George Bennett, Poly Bennett, Joseph D. Bryan, Jr., Martha Bryan, Marian Bennett, P. N. Bryan, Mary Susan Hodges, Arthur G. Hamlin, Ella P. Hamlin, Kate B. Stewart, Robert S. Nelson and for argument to the pleas of Isaac A. Stewart and Shepard J. Hodges, as to sufficiency and appoints Tuesday, the 19th day of January, 1862, for the said hearing, or as soon thereafter as counsel can be heard.

James R. Challen, Complainants' Counsel.

To E. K. Foster, Esq., Hamlin & Stewart, Esqs., F. C. Austin, Esq., C. R. King, W. R. Bush, and others; Counsel for Defendants.

G. P. GREELEY, ET AL, vs. R. H. LOWE, ET AL. } Circuit Court, United States, Northern District of Florida. In Chancery.

And now comes complainant and sets down the special demurrer of defendant Hamlin and wife and Stewart and wife after the foregoing motions and also the demurrer of James M. Foster, individually and as guardian for Hezekiah Foster, Sarah Foster (minors), Mary F. Johnes and Henry R. Johnes, her husband, W. R. Bush, Walter A. Drake, et al, for hearing made the rule.

Also set down the pleas of D. B. Parce for hearing as to sufficiency and all other pleas and demurrers as if specially named.

James R. Challen, Complainants' Solicitor.

February 1st, 1892.

G. P. GREELEY, ET AL, vs. R. H. LOWE. ET AL. } Circuit Court, United States, Northern District of Florida. In Chancery.

It is hereby agreed between counsel for complainants and defendants that the following papers may be omitted from the Transcript.

Special Appearance of Colin McRae, et al.
Special Appea-ance of W. A. Drake, et al.
Special Appearance of W. T. Purviance, et al.
Demurrer to Petition for Rehearing.
Demurrer of W. R. Bush.

And that the following papers need not be printed unless required by the court, but shall be a part of the record:

Subpœnas and Returns.
Appearances.
Exhibits of Deeds to Bill.

Provided that all papers made part of the record and not printed be properly indexed.

STEWART & BLY,
Attorneys for Certain Appellees.
JAMES R. CHALLEN,
Counsel for Appellants.

November 10th, 1892.

United States Circuit Court, Fifth Circuit, Northern District of Florida. In Chancery.

GEORGE P. GREELEY AND WIFE, vs. RICHARD H. LOWE, ET AL. } Certificate of Clerk.

I, Philip Walter, Clerk of said Court, do hereby certify that the foregoing transcript, pages from Ninety-Eight to Two Hundred and Twenty-Six, inclusive, is a true, full and complete record of the judgment pleadings, proceedings and entries in said case from the files and records of the original case in this office in connection with, and as added to the transcript heretofore made in this case on the 17th day of August, A. D. 1892, which includes from Page One to Page Ninety-Seven, the balance of the record, but not including the duplicate appearances and the demurrers omitted by consent.

Witness my hand and the seal of the Circuit Court at the City of Jacksonville, in the District and Circuit aforesaid, this 11th day of November, A. D. 1892, and of our Independence the 117th year.

[SEAL]. PHILIP WALTER,
Clerk U. S. Circuit Court, Northern District of Florida.

CONTINUATION OF RECORD.

In Circuit Court, United States, Northern District of Florida.
In Chancery.

GEO. P. GREELEY AND MARY P. GREELEY,
vs
R. H. LOWE, ET AL.

ENTRY OF REVIVOR.

And now comes Mary P. Greeley, one of the complainants, by James R. Challen, her solicitor, and suggests to the court that Geo. P. Greeley, complainant, has, since the last entry herein, departed this life testate, leaving by his last will and testament this complainant the said Mary P. Greeley, his executrix and devisee in fee of the lands, tenements and hereditaments mentioned and described in the Bill of Complaint herein, and the said Mary P. Greeley as such complainant, having presented and filed here a bond for appeal in due form of law with good and sufficient sureties, the same is duly approved and it is now ordered that said case be, and the same is now revived in the name of said Mary P. Greeley, as complainant, and that the appeal with assignments of error as heretofore given, now stand in full force and effect in behalf of said Mary P. Greeley as complainant.

Done in court this 20th day of January, 1893.

CHARLES SWAYNE, Judge.

BOND FOR APPEAL.

Know all men, that I, Mary P. Greeley, of Hillsborough county, New Hampshire, as principal, and we Charles Dewey, Edward Dewey, of Washington county, Vermont and Charles J. Rogero, of Palatka, Putnam county, Florida, as sureties, are held and firmly bound to Richard H. Lowe, for himself and as trustee for all the other appellees in the case hereinafter named in the sum of two hundred and fifty dollars ($250.00) to be paid to the said Richard H. Lowe, for himself and as trustee as aforesaid, his executors, administors and assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns firmly by these presents.

Signed and sealed this 4th day of January, A. D., 1893.

The conditions of this obligation are such that, whereas, the said Mary P. Greeley, and Geo. P. Greeley, her husband, then living but since deceased, have appealed from the judgement, findings and decree of the Circuit Court of the United States. Northern District of Florida, in a certain case in chancery wherein they are complainants and Richard H. Lowe et al are defendants, to the Supreme Court of the United States: Now, therefore, if the said Mary P. Greeley, or the legal representative of said Geo. P. Greeley, deceased, or both, shall prose cute said appeal to effect, and shall pay all costs and damage taxable and taxed against them or either of them as appellant and shall hold the said Richard H. Lowe, and all the other defendants harmless if the said appeal is dismissed, and if the judgment, findings, and decrees are affirmed, then this obligation to be void, otherwise to be in full force and virtue in law.

Attest as to Mary P. Greeley:
Mary G. Dewey,
Kate D. Squire,
As to Chas. Dewey, Edward Dewey:
Mary G. Dewey,
Kate D. Squire.

MARY P. GREELEY, [seal]
CHARLES DEWEY, [seal]
EDWARD DEWEY, [seal]
CHARLES J. ROGERO, [seal]

Manuel H. Rogero, W. S. Brudette. } As to Charles J. Rogero.

State of Vermont, }
County of Washington, }

Chas. Dewey and Edward Dewey, each being first duly sworn says he is worth the sum of two hundred and fifty dollars over and above all exemptions allowed by the constitution and laws of Florida.

Sworn to and subscribed before me this 4th day of January, A. D., 1893.

H. M. CUTLER, [seal]
Notary Public.

State of Florida, }
County of Putnam. }

Chas. J. Rogero, being first duly sworn, says he is worth the sum of two hundred and fifty dollars, over and above all exemp-

tions allowed by the constitution and laws of Florida.

Chas. J. Rogero.

Sworn to and subscribed before me this 10th day of January, A. D., 1893. W. S. BRUDETTE, [seal]
Notary Public State at Large.

This bond taken and approved by me the 20th of January, A. D., 1893. CHARLES SWAYNE, Judge.

Filed January 20, 1893.

In Circuit Court United States, Northern District of Florida.
In Chancery.

George P. Greeley and Mary P. Greeley,
vs.
Richard H. Lowe, et al.

And now comes Mary P. Greeley, individually and as executrix of the last will and testament of George P. Greeley, deceased, and sole surviving compla nant, and conceiving herself aggrieved by the order of June 15th, 1892, affirming the order of April 12th, 1892, dismissing the bill of complaint in this case, does hereby appeal f·om said orders to the Supreme Court of the United States, and prays that this, her appeal may be allowed, and she further represents that she has heretofore filed a good and sufficient bond for said appeal to said Supreme Court, and she prays that the same may be allowed here for this appeal, and that she has also filed, and now again gives her assignment of error, to-wit:

1st. That the court erred in sustaining the motion and pleas of certain defendants, on the ground that this court had not jurisdiction of the parties in this case.

2nd. That the court erred in its orders and decree dismissing this cause for want of jurisdiction.

3rd. That the court erred in its final decree in this cause, dismissing the bill of complaint. JAMES R. CHALLEN,
Counsel for Complainant.

And now, to wit: on this 21st day of April, A. D., 1893, it is ordered that this appeal be allowed and that the bond heretofore filed be allowed and approved for this appeal.

CHARLES SWAYNE, Judge.

Filed April 21st, 1893.

Circuit Court United States, Northern District of Florida. In Chancery.

Mary P. Greeley, individually, and as executrix of the last will and testament of Geo. P. Greeley, deceased,
vs.
Richard H. Lowe et al.

And now comes the complainant and suggests to the court that since the decree of dismissal in this cause Donald McRae, a defendant, has departed this life testate, and that Mary L. McRae, Agnes McRae Parseley, Donald McRae, Jr., Hugh McRae, all citizens of North Carolina, resident at Wilmington, are his sole surviving heirs and devisees, and that Philip E. Lowe, another defendant, has also departed this life intestate, and that Virginia Lowe, his widow, F. B. Lowe, Mrs.——Stubbs, and Sidney Bell Stubbs, her husband, Roberta Lowe, Scotia P. Lowe, Zuma Lowe, Jennie Lowe, Phillip E. Lowe, and Maxie W. Lowe, all citizens of Suwannee county, Florida, and residents there, are his heirs at law.

It is therefore ordered that they be made parties, that citation for appeal which is now prayed for, may be taken against them.

Done in open court this 21st day of April, A. D., 1893.

CHARLES SWAYNE, Judge.

THE UNITED STATES OF AMERICA, SS.

To Richard H. Lowe, and all the other defendants named in the Bill of Complaint and the amendments thereto, except Donald McRae, instead of whom the following heirs and devisees, Mary L. McRae, Agnes McRae Parseley, Donald McRae, Jr., Hugh McRae; and also except, Phillip E. Lowe, instead of whom the following heirs at law: Virginia Lowe, F. B. Lowe, Mrs. —— Stubbs, and Sidney Bell Stubbs, her husband, Roberta Lowe, Scotia P. Lowe, Zuma Lowe, Jennie Lowe, Phillip E. Lowe, Maxie F. Lowe.

You are hereby cited to be and appear at the Supreme Court of the United States, to be held in Washington, on the 2nd Monday of October, A. D., 1893, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States, wherein Mary P. Greeley is sole surviving sppellant, and Richard H. Lowe and others as named in the Bill of Complaint and the amendments thereto and herein, are respondents, to show cause, if any there be,

why the judgment in the writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 21st day of April, A. D., 1893. CHARLES SWAYNE, Judge.

Circuit Court United States, Northern District of Florida. In Chancery.

Mary P. Greeley,
vs.
Richard H. Lowe, et al.

I hereby accept service of citation for appeal for Philemon N. Bryan, Leroy Bryan, Joseph D. Bryan, Jr., Martha Bryan, George Bennett, Polly Bennett, and Marian Bennett

May 12, 1893.

E. K. FOSTER,
Solicitor for Defendants Named.

In the Circuit Court of the United States, Northern District of Florida. In Chancery.

BILL OF REVIVOR.

To the Honorable, the Judge of Said Court:

The Bill of Revivor of Mary P. Greeley, of New Hampshire, citizen and resident of Nashua in said State shows, that, heretofore, to wit on the 3rd day of November, A. D., 1891, she joined with George P. Greeley, her husband, since deceased, in a Bill of Complaint as co-complainant against Richard H. Lowe, Philip E. Lowe, Donald McRae and about one hundred and twenty other defendants, whose names, citizenship and residence are fully set out in said Bill, to which reference is prayed, as they are too numerous to mention here and they are unnecessary for this proceeding; that said Bill set out that complainant, G. P. Greeley, was seized as tenant in common of the estate of inheritance in the grant of land made by the Spanish Government to John T. Lowe and others, confirmed by the U. S. to John W. Lowe and others, and patented to them by patent recorded in Liber 18 folio 89 et-seq. of Private Land Claims in the General Land Office, to

which reference is made, said land being 10016 acres in Volusia county, Florida, of the value of over $10000, and that said G. P. Greeley was in actual possession of the same, and the said Mary P. Greeley was entitled to an inchoate right of dower in the portion of said lands of which the said G. P. Greeley was seized and that defendants, naming them, were claiming an interest in certain portions of said lands, praying that they be made parties to said Bill, and be required to set up and prove their right and title, if any and that partition be made to those entitled, or that their said claims be held null and void, and for taxes, advances and costs, including counsel fees:

That thereupon subpœnas were issued and service made according to law upon said defendants and appearances entered, and certain pleas filed to the jurisdiction and motion to dismiss made for want of jurisdiction, and such proceedings were had that said court dismissed said Bill on or about April 12th, 1892, for want of jurisdiction over the parties thereto, and upon a rehearing adhered to said order of dismissal and finally dismissed said Bill June 15th, 1892.

And thereupon said complainant appealed from said decree to the United States Court of Appeals, 5th Circuit, which court refused to hear said appeal, for that the Supreme Court of the U. S. only had jurisdiction to hear the appeal:

And now this complainant Mary P. Greeley says that on or about December 24th, 1892, the said G. P. Greeley departed this life testate, leaving all his estate, real and personal, to her, and appointing her sole executrix of his last will and testament, which has been duly admitted to probate, and to this complainant letters testamentary have been issued, and she is the duly qualified acting executrix of the same will, and in addition thereto she is the sole heir at law, as well as devisee of the said G. P. Greeley, deceased, and by reason of all the premises she is now the sole representative in the realty, and is seized of the same lands as described in the said Bill equivalent to 1992.03 acres, which she is entitled to have set off to her in severalty, or the proceeds thereof if sold.

And she further says that since the decree of dismissal of said Bill, the said Donald McRae has departed this life testate, leaving his interest in said lands, if any, to Mary L. McRae, Agnes McRae Parseley, Donald McRae, Jr., and Hugh McRae, all citi-

zens of North Carolina, resident at Wilmington, his sole surviving heirs and devisees.

That Philip E. Lowe, another defendant, has also departed this life intestate, since said decree was entered and that Virginia Lowe, his widow, now a party, F. B. Lowe, Sidney Bell Stubbs, and T. A. Stubbs, her husband, Roberta Lowe, Scotia Lowe, Zuma Lowe, Jennie Lowe, Philip E. Lowe, and Maxie W. Lowe, all citizens and residents of Suwannee county, Florida, are his heirs at law.

And the said Mary P. Greeley is entitled to have said decree revived as to the representatives in the realty of the said Donald McRae and Philip E. Lowe deceased to the end that citations for an appeal to the Supreme Court of the United States may be served on them, or that they may be properly notified of any appeal she may take or may have taken to said appellete court, and being desirous of such appeal, she sets up this, her Bill of Revivor.

To the end therefore, that the said defendants may, if they can show why said complainant should not have the relief prayed for, and may without oath, for that is expressly waived, answer this Bill of Revivor that she may have the said judgment and decree revived as against said defendants, and that said complainant may have all other and further relief proper and necessary.

May it please your honor to grant the writ of subpœna for said F. B. Lowe, Sidney Bell Stubbs, Thos. A. Stubbs, her husband, Roberta Lowe, a minor, Scotia Lowe, a minor, Zuma Lowe, a minor, Jennie Lowe, a minor, Philip E. Lowe, Jr., a minor, Maxie W. Lowe, a minor, the said Virginia Lowe, guardian of said minors, commanding them to appear and show cause why said final judgment and decree should not be revived and the complainant have all proper relief and to abide by and perform the judgment and decree of the court herein.

MARY P. GREELEY,
By James R. Challen, her Solicitor.

State of Florida, }
Northern District, }

James R. Challen, being first duly sworn, says he is the solicitor for the said Mary P. Greeley, complainant in

the above Bill of Revivor, that he has read and knows the contents of said Bill; that the matters and things therein stated upon her knowledge, affiant knows to be true, and those alleged on information and belief he believes to be true, that said complainant is absent from this district, and affiant knows the facts herein stated as well as complainant.

JAMES R. CHALLEN.

Sworn to and subscribed before me this 9th day of June, 1893.

PHILIP WALTER, Clerk.

PRECIPE FOR APPEARANCE.

In the Circuit Court of the U. S., 5th Judicial Circuit, Northern District of Florida. In Chancery.

Mary P. Greeley,
vs.
Richard H. Lowe, Thomas A. Stubbs, Sidney Bell Stubbs, Virginia Lowe, Roberta Lowe, Scotia P. Lowe, Zuma Lowe, Jennie Lowe, Philip E. Lowe, Jr., Marie W. Lowe.

The Clerk of the Circuit Court will please enter our appearance for the above defendants, except Richard H. Lowe, forthwith in the above entitled cause, hereby waiving subpœna and citation on appeal. And oblige

Filed June 9th, 1893.

ANGUS PATTERSON,
H. J. McCALL,
Attorneys for Defendants.

Isaac A. Stewart, Kate B. Stewart, Arthur G. Hamlin, Ella P. Hamlin, William R. Bush, Charles R. King, Walter A. Drake, James M. Foster, Mary F. Johns, Henry B. Johns, Hezekia Foster, minor, Sarah Foster, minor, James M. Foster, their guardian, Sophia L. Davis, Nicholas Davis, Susan R. Davis, DeWitt C. Davis, Sarah Lowe, Lucy Lowe, Richard H. Lowe, Robert J. Lowe, Elles Lowe, Carrol Lowe, Manning Lowe, Fannie Lowe, Jr., Marie Lowe, Fannie Lowe, guardian; Nancy McRae, Mary L. McRae,

Agnes McRae Parsley, Donald McRae, Jr., Hugh McRae, Mary C. Van Vorst, Fred B. Van Vorst, Sallie McRae, Caroline D. McRae, George N. McRae, minor, Walter McRae, minor, Frederic D. McRae, minor, Christiana Williams, Jackson Williams, Alex Purviance, Gerald Purviance, Colin McRae, Annie McRae, Kate A. Vink,——Vink (first name unknown), Annie P. Aldeman, William Aldeman, John D. McRae, William W. McRae, Roderick McRae, Mary A. Grace, B. F. Grace, Sallie McR. Chater, R. Dundas Chater, George McRae, W. T. Purviance, Caroline A. Drake,——Drake (first name unknown), Margeret E. Gurganus, —— Gurganus, Marie Makepeace, George H. Makepeace, Margaret H. Markham, F. E. Markham, Mary Rotha, R. S. Rotha.

You are hereby cited to be and appear at the Supreme Court of the United States, to be held in Washington on the 2nd Monday of October, A. D. 1893, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States, Northern District of Florida, wherein Mary P. Greeley is sole surviving appellant, and Richard H. Lowe and others, as named in the Bill of Complaint and the amendments thereto are respondents to show cause, if any there be, why the judgment in the writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Mellville W. Fuller, Chief Justice of the Supreme Court of the United States, this 21st day of April, A. D., 1893. CHARLES SWAYNE, Judge.

We hereby accept service of the foregoing citation, this 10th day of May, A. D., 1893. ISAAC A. STEWART,
EGFORD BLY,
Composing firm of Stewart & Bly.

Circuit Court United States, Northern District of Florida. In Chancery.

Mary P. Greeley,
vs.
Richard H. Lowe et al.

We hereby waive subpœna and enter a special appearance for Mary L. McRae, Agnes McRae Parsley, Donald McRae, Jr., Hugh McRae, for the purpose of objecting to the jurisdiction of this court. ISAAC A. STEWART,
EGFORD BLY.
Composing firm of Stewart & Bly.

NOTICE OF APPEAL, ALLOWANCE AND ORDER.

Circuit Court, United States, Northern District of Florida. In Chancery.

Mary P. Greeley,
vs.
Richard H. Lowe et al.

And now comes Mary P. Greeley individual sole surviving complainant, and conceiving herself aggrieved by the order of June 15th, 1892, affirming the order of April 12th, 1892, dismissing the Bill of Complaint in this cause, does hereby appeal from said orders to the Supreme Court of the United States, and prays that this, her appeal, may be allowed, and she further represents that she has filed a Bill of Revivor against Mary L. McRae, Agnes M. Parseley, Donald McRae, Jr., and Hugh McRae, Virginia Lowe, F. B. Lowe, Sidney Belle Stubbs,——Stubbs, her husband, Roberta Lowe, Scotia P. Lowe, Zuma Lowe, Jennie Lowe, Philip E. Lowe, and Maxie W. Lowe, and that said parties have entered their appearance, but have, by the practice of this court, until the rule day in July next to show cause why this suit should not be revived as to them, and that she has heretofore filed a good and sufficient bond for appeal, but that the parties in this cause are very numerous and the record voluminous and she prays citation may issue against all of the above named parties, unless they show cause on or before July rules proximo why this suit should not be revived, and against all who have been served with process and appeared as if named, that said bond be approved and allowed for this appeal and that she may have sixty days in which to perfect this appeal.

JAMES R. CHALLEN,
Counsel for Appellant.

And now, to-wit: on this 16th day of June, 1893, in open court, it is ordered that this appeal be allowed, and that unless the parties above named show cause on or before July rule day proximo why this suit should not be revived, that the complainant have an order of revivor as of course and that citation issue as prayed for against all who have been served with process and appeared as if named, that said bond be approved and duly allowed for this appeal, and that appellant have sixty days in which to perfect her appeal.

CHARLES SWAYNE, Judge.

Filed June 16th, 1893.

THE UNITED STATES OF AMERICA, SS.

To Richard H. Lowe and all the other defendants named in the Bill of Complaint and amendments thereto in the case of George P. Greeley and Mary P. Greeley, in the Circuit Court of the United States, Northern District of Florida, who have been served with process and have appeared, except Donald McRae, deceased, instead of whom Mary L. McRae, Agnes M. Parsely, Donald McRae, Jr., Hugh McRae, and also except Philip E. Lowe, deceased, instead of whom Virginia Lowe, F. B. Lowe, Sidney Belle Stubbs,———Stubbs, her husband, Roberta Lowe, Scotia P. Lowe, Zuma Lowe, Jennie Lowe, Philip E. Lowe, Jr., Maxie W. Lowe, unless these named show cause on or before the rule day in July 1893, why this suit shall not be revived, and who have entered an appearance,

Greeting:

You are hereby cited to be and appear at the Supreme Court of the United States to be held in Washington on the 2nd Monday of October, 1893, pursuant to an appeal filed in the Clerk's office of the Circuit Court aforesaid wherein Mary P. Greeley is sole surviving appellant and Richard H. Lowe and others as named in the Bill of Complaint and the amendments thereto and herein are respondents, to show cause if any there be why the judgment in said Circuit Court dismissing the Bill of complaint should not be vacated and corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of June, A. D., 1893. CHARLES SWAYNE, Judge.

Volusia County, }
State of Florida, }

A. A. Berry personally appeared before me Chas. R. Dilzer, a a notary public in and for said county and State, and being first duly sworn says that he handed a true copy of the attached citation to Robert S. Nelson, Harriet Nelson, his wife, Charles W. Goodrich, Hester Goodrich, his wife, W. A. Goodrich and Pinkey Goodrich, his wife, A. Q. Goodrich, Anna Goodrich, his wife, Georgiana Bryan, defendants in the said G. P. Greely et al vs. R. H. Lowe et al, in the Circuit Court of the United States, Northern District of Florida. ALEX A. BERRY.

Sworn to before me and subscribed in my presence the 3rd day of July, A. D., 1893. CHAS. R. DILZER,
[seal] Notary Public Volusia County, Fla.

Duval County, } SS.
State of Florida. }

Eli Dilworth, being first duly sworn, says he served a true copy of the attached citation upon Porcher L'Engle, of the firm of Walker & L'Engle, solicitors for the Howard Land and Improvement Company, defendant, by handing the same to him personally on the 15th day of July. 1893. ELI DILWORTH.

Sworn to and subscribed before me July 15th, 1893.
JOHN S. DRIGGS,
Deputy Clerk.

United States of America, } SS.
Northern District of Florida. }

James R. Challen, being first duly sworn, says that he served true copies of the citation for appeal in this case upon the following defendants, between the 16th day of June and the 15th day of July, 1893, in manner and form following, to-wit: By written acknowledgment of service of Anna Cavan, Granville B. Burke, Clarence W. Balis, Samuel C. Warner, Grace C. Warner, A. S. Goodrich, S. C. Krulder. By written acknowledgment of service from Stewart & Bly, successors of Hamlin & Stewart, Angus Patterson, H. J. McCall, E. K. Foster, J. D. Broome and J. W. Price, as counsel and solicitors for their several clients, defendants; by registered mail duly receipted for personally by F. C. Austin, solicitor for the several defendants for whom he has appeared; personally on F. W. Pope, solicitor for the several defendants for whom he appeared; and that all the defendants and appellees who have been served with subpœnas or by substituted process and have entered appearance have been cited to appear or have waived citation as appears by the record.

JAMES R. CHALLEN.

Sworn to and subscribed in my presence July 15th, 1893.
JOHN S. DRIGGS,
Deputy Clerk.

ORDER OF REVIVOR.

Circuit Court United States, Northern District of Florida. In Chancery.

Mary P. Greeley, survivor &c., }
vs.
R. H. Lowe, et al. }

The said Mary P. Greeley, now sole surviving complainant and representative in the realty involved herein of the co-complainant George P. Greeley, deceased, whose death has heretofore

been suggested of record, now comes, and it appearing that Donald McRae, defendant, has departed this life testate, since the final decree herein, and that Mary L. McRae, Agnes M. Parsley, Donald McRae, Jr., and Hugh McRae, are his devisees and proper representatives, and that Philip E. Lowe, defendant, has also departed this life intestate since final decree, and Virginia Lowe, F. B. Lowe, Sidney Belle Stubbs,———Stubbs, her husband, Roberta Lowe, Scotia P. Lowe, Zuma Lowe, Jennie Lowe, Philip E. Lowe, Jr., and Maxie W. Lowe, are his widow and heirs at law, have waived citation and entered their appearance and had due notice of proceedings to revive this action and have not shown cause to the contrary but are in default, it is now ordered that this suit be and the same is hereby revived as to them and each of them.

Done this July 3, 1893.

Filed July 3d, 1893.

JAMES R. CHALLEN,
Counsel for Complainant.

ASSIGNMENTS OF ERROR.

Mary P. Greeley,
vs.
Richard H. Lowe, et al.

The appellant by her counsel says that in the record and proceedings of this cause there is manifest error in this, to wit:

1st. Sustaining the motion and pleas of certain defendants on the ground that this court had not jurisdiction of the parties to this cause.

2nd. In its order and decree dismissing this cause for want of jurisdiction.

3rd. In its final decree in this cause dismissing the Bill of Complaint.

4th. That even if said bill had to be dismissed that should only have been done without prejudice to another action.

JAMES R. CHALLEN,
Solicitor and Counsel for Complainant as Appellant.

Filed July 15th, 1893.

I hereby certify that the foregoing transcript, printed pages 76 to 89 inclusive, is a true, full and complete record of the pleadings, proceedings, entries and judgment in the case of George P. and Mary P. Greeley vs. R. H. Lowe et al. in the United States Circuit Court, Northern District of Florida, in connection with and as added to the transcript heretofore made in this case on November 11th, 1892, which includes the balance of the record as stated.

Witness my hand and the seal of the Circuit Court, at Jacksonville, Fla., this 24th day of July, A. D., 1893, and of our independence 118th year.

PHILIP WALTER,
Clerk U. S. Circuit Court, Northern District.
By JOHN S. DRIGGS,
Deputy.

INDEX—See Page following 75.

Entry of Revivor as to M. P. Greeley, - - - - - 76

Bond for Appeal of M. P. Greeley, - - - - - - 76

Notice of Appeal and Allowance, - - - - - - 78

Death of D. McRae and P. E. Lowe suggested - - - 79

Citation, - - - - - - - - - - - 79

Citation Accepted, - - - - - - - - - - 80

Bill of Revivor, - - - - - - - - - - 80

Appearances to same, - - - - - - - - - 83

Notice of Appeal, allowance and order, - - - - 86

Order of Revivor, - - - - - - - - - 88

Citation, service and acceptance, - - - - - 87

Assignments of Error, - - - - - - - - 89

Certificate of Clerk, - - - - - - - - 89

In the Supreme Court of the United States, October Term, 1893.

MARY P. GREELEY, Individually and as Executrix and Devisee of George P. Greeley, Deceased, Appellant,
vs.
RICHARD H. LOWE *et al.*
No. 910.

Stipulation.

It is mutually agreed between the respective parties in this case that the printed record made up of the transcript from pages 1 to 56, additional transcript from pages 57 to 75, and continuation of the record from page 76 to 89 may be used in place of the original record without comparison or verification, and that the transcript taken on former appeals may all be supplanted by that of June 16, 1893, certified under date of July 24, 1893, and that the case may be heard on said printed transcript of record, reserving, however, all right of objecting to any of the orders, decrees, or proceedings therein contained.

GEORGE A. KING.
Solicitor for Appellants.
ELEAZER K. FOSTER,
Solicitor for Appellees.

[Endorsed:] No. 910. In the Supreme Court United States. Mary P. Greeley *v.* R. H. Lowe *et al.* Stipulation to hear on printed transcript.

[Endorsed:] Case No. 15,285. Supreme Court U. S., October term, 1893. Term No., 910. Mary P. Greeley, ex., &c., app't, *vs.* R. H. Lowe *et al.* Stipulation in regard to transcript of record. Filed Dec. 15, 1893.

Circuit Court of the United States, Northern District of Florida.
In Chancery.

GEORGE P. GREELEY & MARY P. GREELEY
vs.
R. H. LOWE *et al.*

Certificate of Question at Issue.

This cause came on to be heard upon the question of the jurisdiction of this court, and it appearing to the court that while it is true that the complainants are citizens of New Hampshire and resident there and some of the defendants are citizens of Florida and resident in the district in which the land lies, yet because there are other defendants citizens of New York, and also citizens of other States than the State in which the complainants reside and have citizenship, and also citizens of other Federal districts than that where the land is situate and where certain defendants reside, now, therefore, it *was* adjudged and decreed that this court has not jurisdiction over all of the defendants to this action because they are not all citizens and residents of the district in which the land

sought to be partitioned lies and are not all found in said district at the time of service of process, although they are all residents and citizens of other States than that in which complainants have residence and citizenship.

Now, therefore, it is hereby certified that the above question of jurisdiction is by the appeal taken in this case the only question at issue upon the pleadings and processes in this case for the decision of the Supreme Court of the United States.

Done in court this 27th day of February, A. D. 1894.

CHAS. SWAYNE, *Judge.*

Endorsed: Circuit court U. S., N. dist. Fla. In chancery. G. P. Greeley *et al. vs.* R. J. Lowe *et al.* Certificate of question at issue. Filed Feb. 27, 1894. Philip Walter, clerk. J. R. Challen, solicitor.

I hereby certify that the foregoing is a true transcript of an entry in this cause, and in connection with and added to the transcript heretofore made in this case on July 24, A. D. 1893, makes a true, full, and complete record of the pleadings, proceedings, entries, and judgment in the case of George P. Greeley and Mary P. Greeley *vs.* R. H. Lowe *et al.* in the United States circuit court, northern district of Florida.

Seal U. S. Circuit Court, Northern Dist. of Florida.

Witness my hand and the seal of the circuit court, at Jacksonville, Florida, this 6th day of March, A. D. 1894, and of our Independence the 118th year.

PHILIP WALTER, *Clerk.*

It is hereby agreed that the foregoing may be filed as part of the transcript of the record and that this may be printed without reprinting the previous record.

JAMES R. CHALLEN,
GEORGE A. KING,
For Appellants.
ELEAZER K. FOSTER,
For Appellee.

[Endorsed:] Supreme Court United States. G. P. & M. P. Greeley *v.* R. H. Lowe *et al.* Certificate of questions for Supreme Court. James R. Challen, solicitor.

[Endorsed:] Case No. 15,285. Supreme Court U. S., October term, 1893. Term No., 910. Mary P. Greeley, executrix, &c., app't, *vs.* R. H. Lowe *et al.* Certificate of questions at issue. Filed Mar. 26, 1894.

Brief of Appellants Counsel.

UNITED STATES

CIRCUIT COURT OF APPEALS.

FIFTH CIRCUIT.

No......

GEORGE P. GREELEY, ET UX,
Appellants.

VS.

RICHARD H. LOWE, ET AL,
Appellees.

The Lowe Grant Case.

Appeal from United States Circuit Court, Northern District of Florida. In Chancery. For the Partition of Real Estate.

JAMES R. CHALLEN,
Counsel for Appellants.

UNITED STATES CIRCUIT COURT OF APPEALS.

FIFTH CIRCUIT. IN CHANCERY.

GEORGE P. GREELEY AND WIFE,
vs.
RICHARD H. LOWE, ET AL.

Appeal from Circuit Court United States Northern District Florida.

BRIEF FOR APPELLANTS.

ABSTRACT OF THE CASE.

Appellants as complainants in the court below filed their Bill of Complaint for the partition of real estate, situate in the district in which the action was brought, alleging that—record, page 1:

1. The complainants were citizens and residents of New Hampshire:

Philemon N. Bryan and other defendants were citizens and residents of said district of Florida:

J. Houston M Clinch and others named were citizens and residents of Georgia, other defendants named, citizens of Alabama, North Carolina, Texas and New York. One hundred and thirty defendants:

2. The complainant was seized as tenant in common, in fee simple, and in actual possession of 10,016 acres of land in said district, of the value of $10,000, exclusive of interest and costs, page 2:

3. The land was a mill-right grant from Spain, in 1816, and the grantee John T. Lowe, being then married, his wife Susan Lowe was seized by ganancial right under the laws of Spain, for that real estate acquired by either husband or wife during coverture by purchase, gift or gain became and remained community property and they were seized as tenants in common; that said grant was confirmed by the Supreme Court of the United States at the January term 1842, and the ganancial right and title of said Susan Lowe has never been alienated, relinquished or annulled, but has been protected and guaranteed by the Treaty of February 22nd, 1819, as by reference to Article VIII of said Treaty, and the Statute of Florida of December 23rd, 1824, Chapter 150, McClellan's Digest will fully and at large appear, pages 3 and 4:

4. John T. Lowe attempted to convey to G. J. F. Clark, the south-

ern half of said grant, but his wife then living did not join and the half of the South half only was conveyed. Clark conveyed to Duncan L. Clinch, who died testate leaving J. Houston M. Clinch his executor and trustee with power to sell said lands; share, half of South half or one-fourth, page 4:

5. Susan Lowe survived the said John T. Lowe, but both are deceased intestate and their estates have long since been settled up, page 5:

6. The North half of said grant and the half of the South half descended to their children, nine in number, named, page 5:

7. The survivors and heirs were six stocks, naming them, each stock taking one-eighth of the entire grant, page 6:

8. The genealogy and shares of the heirs and their grantees are stated in this and succeeding sections of the Bill to section 41. All the claims of various parties of record being set up and defined, and the invalidity of certain deeds pointed out they being all attached as Exhibits, pages 6 to 26: Subject to dower, page 13:

No other person or persons than the parties named have any interest, or title to the premises; almost impossible to trace the lineage of the several families and to find the actual parties in interest and to identify and verify the last heirs and devisees of their respective ancestors, page 28:

The Bill also sets up that some of the descendants of John T. Lowe have conveyed and reconveyed the land in tracts, by metes and bounds, and all their interest in the grant at different times, and the grantees are all parties and are required to set up and prove their respective interests, their deeds being annexed as Exhibits, page 27:

The shares of the actual tenants in common are set forth in tabular form as well as defined by specific averments in proper place, page 29:

The prayer is for answers to the Bill and to the Interrogatories, that the deeds exhibited may be construed, and where no interest is conveyed that they be canceled:

That all persons having any claim or lien on the lands may be brought in and required to set up and prove their claim or lien or have same held void:

That partition may be made if possible and equitable, and if not, that land be sold and proceeds distributed:

That complainants recover advances, and outlays for taxes and expenses including costs and counsel fees in this case:

For a Master Commissioner to make partition for general relief, and also for subpoena for defendants, naming them, pages 30-32.

The amendments were as follows, pages 46 and 47:

The Clinch heirs were all dismissed except J. H. M. Clinch as executor and trustee; the "unknown heirs of Alexander, John and Archibald McRae," were stricken out and all allegations concerning said parties and the unknown heirs, and the name of Clarence W. Balis, Samuel C. Warner and Grace C. Warner with proper allegations of citizenship and residence were added to the introductory clause:

The allegations of probate of the will of D. L. Clinch, in Duval County, Florida, and of issuance of letters testamentary by the Court of Probate of said County and State, and that J. H. M. Clinch as trustee is entitled for himself and for his cestuis que trust to the half of the South half of said grant in land or the proceeds thereof if sold, but being a large compact body, the same can be set off in severalty:

The other devisees of D. L. Clinch are unnecessary parties and are stricken out that this court may retain jurisdiction

Copy of the will is exhibited, page 49. It sets out that this land is devised to the executor named to be sold:

The remaining allegations in the amendment have nothing to do with the question of jurisdiction and are not abstracted, for they would only add unnecessary labor to the court:

The prayer and interrogatories are amended to conform to the other amendments; and in addition, the prayer to quiet title is omitted except in so far as the granting of partition and the denial of right in severalty binds all the parties before the court and precludes re-partition of the same property or any part thereof by the same parties.

The plea of Isaac A. Stewart is to the jurisdiction and sets up, page, 37:

1. That suit is not brought in the district of the residence of either complainants or defendants:

2. That the controversy is not between citizens of different States in that defendants Parce, Warner and Van Vorst are residents and citizens of New York, are material parties, their interests adverse, to each other and this court has not jurisdiction on any other ground than an alleged difference of citizenship of the parties.

3. The same as the second, setting up that Hodges and other defendants, citizens of Florida claim adverse to the other defendants, citizens of Florida and claim, by deed and adverse possession, the same land that other citizens of Florida, parties hereto claim, and that they are all material parties, and that there is no other ground of jurisdiction than alleged difference in citizenship.

4. That Eliza B. Anderson defendant, is a resident and citizen of the District of Columbia, and claims an undivided interest in the South half of the property sought to be partitioned and is therefore a necessary party, that her claim is adverse to this defendant and to all the parties except the heirs of D. L. Clinch, and that the controversy is between citizens of Florida and other States and a citizen of the District of Columbia, and is not a controversy between citizens of different States.

5. That Mary P. Greeley is improperly joined, is not a co-tenant and cannot maintain this suit against this, or any defendant herein.

6. That the wives of the several defendants are improperly joined in that they possess no legal interest in the property sought to be affected.

7. That the estates of W. H. Caven, D. L. Clinch and others deceased, are not yet fully settled, their adm'rs. are necessary parties and partition cannot be maintained until said estates are fully administered.

8. That this defendant, Donald McRae and others, all of whom are parties hereto exhibited their Bill in the Circuit Court of Volusia County, Florida, in chancery December 21st, 1889, against said G. P. Greeley and other defendants herein, alleging a cause of action by and between the same material parties herein for partition of the same real estate praying the same relief as in the present Bill.

That said cause was removed to this court, January 2nd, 1891, and docketed herein, that motions to remove to the State Court have been made, but never argued and that said former cause now remains depending, undetirmined and undismissed.

The pleas are to the whole Bill and pray dismissal.

George Bennett and wife. et al., demurrer, pages 40 and 41:

That it appears by the Bill that the United States Court has not jurisdiction of the same.

There was also a notice to dismiss for want of jurisdiction, page 42.

Other plea: the duplicate of those filed, some of them carbon copies were filed but are not copied or abstracted for all "the entries and papers on file necessary on the hearing of the appeal," are copied: R. S. U. S. Section 698, Statutes 1891, page 829, Section 11.

The pleas and demurrers were set down for hearing on their sufficiency in law.

A motion for leave to amend the Bill was made, page 41, but opposed, page 42.

FINAL DECREE.

The amendments were allowed and entered, page 43, and the cause came on for hearing upon the question of jurisdiction.

The court held that while it is true the complainants are citizens and residents of New Hampshire, and some of the defendants are citizens of Florida, in the district where the land lies, yet because there are other defendants citizens of New York, and also others citizens of other States than the State in which the complainants reside, and also citizens of other Federal districts than that where the land is situate, and where certain defendants reside, that this court has not jurisdiction over all the defendants to this action, because they are not all citizens and residents of the district in which the land sought to be partitioned lies and are not all found in said district at the time of service of process although they are all residents and citizens of other States than that in which the complainants reside, and although the complainants are willing to amend their Bill and to confine their prayer to partition

only and such findings as must necessarily be made to decree partition yet the court holding that it has not jurisdiction of the parties considers such, or any other amendment fruitless, for that the Bill must be, and is hereby dismissed.

RE-HEARING.

Petition for Rehearing was filed, opposed, heard and allowed.

This petition sets up that by the constitution and laws of the U. S., and the rules of this court it has jurisdiction of all the parties who are citizens of other States than that in which the complainants reside etc., although they did not all reside and could not all be found in the district where the suit was brought, because the jurisdiction of the court is founded not only on the fact that the action is between citizens of different States, but also on the fact that said defendants are parties to "a suit in equity to enforce a legal claim against real property within the district where the suit is brought and are not inhabitants of nor found within said district," according to Section 738 R. S. U. S., and that suit cannot be brought in the district where the absent defendants inhabit for that the action is local and fixed and is not transitory, and for that the proceeding here is for partition, which is in the nature of a proceeding in rem, the RES being in this district, and the absent defendants being interested and having legal or equitable claim therein, and no action for partition can be brought in the district of the defendants unless they reside in the district where the land is situate, but that complainants being citizens of New Hampshire and the land situate in this district, the action cannot be brought in any other than this district, and the complainants not being residents of this district are entitled to venue in this court, and this court not being called upon to render a personal judgment against any of the defendants to be executed in any other district, but in this district only, and there being no order of arrest nor any civil process requiring bail, or requiring the personal presence of any defendant, the residence of certain defendants in other districts is no bar to the jurisdiction of this court.

Also that they are entitled to be heard in this court, and if no other relief can be granted to them, they are entitled to have their own lands set off to them, and the lands belonging to defendants who object to

partition can be left to them unpartitioned, etc.

Upon the Re-hearing the court adhered to its first decision and ordered the Bill dismissed, See page 32, at the end of the Bill.

The Assignments of Error are:

1. That the court erred in sustaining the motion and pleas of certain of the defendants on the ground that this court had not jurisdiction of the parties to this cause.

2. That the court erred in its order and decree dismissing this cause for want of jurisdiction.

3. That the court erred in its final decree in this cause dismissing the Bill of Complaint.

There is no question raised and will not be, except whether the court having jurisdiction of the property and of the cause of action, has it jurisdiction of the parties?

ARGUMEMT.

The special appearances, amendments made or permissible, demurrers, motions, truth of the pleas, and all other proceedings, are not to be considered, except as they bear on the questions of jurisdiction. If the Bill with its amendments on its face does not contain sufficient allegations to sustain the jurisdiction of the court, with such proper amendments, if advised as would conform to truth and good pleading, then the decree must be affirmed.

Whether the demurrer is well taken, or the pleas are sufficient in law, is the only question of any importance. As to this the court has no discretion, as to all others it has. The truth of the pleas may be denied if they are held sufficient in law and well pleaded.

Dower, Page 38, 5 and 6.

It would be advisable to have instructions and rulings from this court as to the presence of wives of co-tenants in partition. It is the MODERN practice to make them parties in partition, for if the property is sold or any of it taken in owalty, the purchaser, or co-tenant charged for owalty, must take subject to dower of wives of co-tenants, unless they are parties, and their dower disposed of by valuing their expectation of life and paying for it.

As it would be inequitable to sell their dowry and pay the proceeds to the husbands, and impossible to sell the land if wives when they became widows could demand re-partition and that dower be set off to each of them as the court on the hearing of their cause should determine, it is supererogation to discuss the question. The wives are unquestionably necessary, but striking them out does not either give or take away jurisdiction. This question can be settled by amendment which neither the nisi prius nor appellate court would refuse to grant, if either of them should hold that they must be stricken out. But so it is, that if this court should sustain the jurisdiction upon the merrits of the Bill, the parties may be saved the expense, delay and annoyance of a future appeal, and this court be relieved of a re-examination of this case, if they will pass upon the question: Are the wives of the respective co-tenants proper or necessary parties in an action for partition when the allegations of the Bill and the prayer ask for a sale of all the property, and the number of the parties and condition of the property is such that three-fourth of it must be sold? I contend that they are necessary:

Knapp on Partition in loc.
Repple v. Gilbor 8 How. Pr. 456.
Wilkinson v. Parish 3 Paige 653.
Where the contary is held it is owing to Statutes:
McArthur v. Franklin 15 Ohio St. 485, 506.
Gordon v. Sterling 13How. Pr. 405.
Curtis v. Snead 12 Gratt 264.
Allen v. Libbey 1 N. Eng. 73 (Mass. 1885.)
Greiner v. Klein 32 Mich. 17.
Lee v. Lindell 64 Am. Dec. 262.

Administrator Says "Stop!" Page 38, 7.

It may also be necessary to pass upon the question whether if a co-tenant is deceased and his estate unsettled, the partition cannot be made. Does the court think it worthy of a moments consideration? The fact that if such a plea is good, partition NEVER could be made, for the time will never come when there will be no unsettled estate among all the heirs to the Lowe Grant, would seem to render the plea so ridiculous, that the court might be justified in preserving dignified silence. But the plea is undoubtedly made because in Florida land passes to the administrator to pay debts, and is a part of his assets be-

fore the heir can claim them. It would seem therefore as if the administrator is the proper party, especially if there is a sale; for then the absurdity of the heir receiving the proceeds when the administrator is entitled to them, would be presented if the heir is the only party; and if the administrator is also a proper and necessary party, it is supposed that he might plead, that his estate not being settled he does not know whether the lands ought to be sold or not, or if sold that the proceeds must be paid to him or not. The anomalous condition of the law of Florida respecting descents of lands would seem to require that the administrator and heir are both necessary parties, but they must decide their own controversies between themselves and in doing so the revolutions of the earth need not be stopped, nor the inhabitants thereof ordered to stand still. Other people may go on and attend to their business if one, or a half a dozen of the one hundred and thirty parties to this suit are in the Probate Court. It is respectfully submitted that no matter what the State Court may have said, the proper and only practice is to bring in the heir and administrator of deceased co-tenants, and make partition; if they cannot agree, let the court hold THEIR share until their controversy can be determined and then turn the share over to the heir or administrator as their interests may appear. If it should be held that the heir is the only proper party, he may get the value of the land in the event of a sale, and by the law of Florida the administrator not having had his day in court may sell the same land over again. No court of equity would permit such injustice. The defendants will show that some Florida court has held that an administrator is not a proper party in an action for partition. In that action the land was not sold, but set off in severalty by metes and bounds. But no matter, this court will be implicitly relied on not to hold that an administrator may block the wheels of progress and the march of justice until his petty estate is settled up!

Notice, an administrator may defend, if he cannot maintain partition.

Executor and Trustee Takes Trust Lands, Page 38, 4

And as to the 4th Plea the amendment to the Bill duly allowed, and therefore a part of the Bill, strikes out Eliza Anderson as a party, and the will of D. L. Clinch testator is exhibited to the court to show (page 49,) that the executor is required to sell this land, and the fact

being that the same executor has not sold this land, and is a party to the cause, and that by the terms of the will the executor is a trustee and is the proper party without any additional authority to sell and dispose of the land. It is very clear that the devisees under the will are unnecessary parties.

Equity Rule 49, C. C. settles the question without argument. It says: "In all suits concerning real estate which is vested in trustees by devise and such trustees are competent to sell and give discharges for the proceeds of sale, and forthe rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executor or administrator in suits concerning personal estate represents the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estates—parties to the suit."

If however after partition is made an ancillary proceeding becomes necessary to determine all the rights of the devisees of Clinch and thus entirely protect them, that may be done without ousting the jurisdiction even if Mrs. Anderson is a resident of D. C., not only under the rule, but according to numerous cases. As in the conclusion of Equity Rule 49; "But the court may upon consideration of the matter IN THE HEARING, if it shall so think fit, order such persons to be made parties."

Equity Rule 47 and also 22, give additional light upon the question.

Goodman v. Niblack, 102 U. S. 562, 3.

The pleadings show clearly that as Clinch is entitled to about 2,500 acers of land: this may be set off to him in a body; and a determination of his rights as trustee under the will, and an executor with power to sell is always for that reason a trustee, will preclude any of his cestuis que trust from ever opening up the controversy and demanding re-partition.

J. H. M. Clinch is therefore the legal representive of the Clinch interest, and the devisees are properly omitted, that this court may without doubt have jurisdiction. It is however capable of proof that Mrs. Anderson is a citizen of South Carolina.

As to Clinch's Executor and Devisees.

If J. H. M. Clinch's executor is personally qualified by his citizenship to bring suit in this Federal Court, or to be sued, the jurisdiction is not defeated by the fact that the party whom he represents may be disqualified. This has been repeatedly adjudged as early as 1808, in

Chappadelaine vs. Dechenaux, 4 Cranch, 307, and afterwards in

Osborn vs. Bank, U. S., 9 Wheat. 738.

Childress vs. Emory, 8 Wheat. 669.

C. C. Equity Rule 49—also 47, 48, 22, 50 and 53.

Pendency of Similar Actions, Page 39, 8.

And as to the plea of another action pending between the same parties, for the same cause of action if that plea were held sufficient in law, the complainant would deny the truth of it; but even if true, the action being in the same court could be consolidated. The truth of the matter being that this plea was not submitted, nor argued, nor passed upon and has nothing whatever to do with the present controversy, I will not burden the court with any argument or many citations concerning it, unless this court requires that it be discussed. For, if this Bill is restored and the court considers the plea, it will either specifically hold it good, or bad in law, or not properly set up and plead. At the proper time the proper showing will be made that there is no suit pending which will call upon the court below to dismiss this suit. If the plea should be well pleaded an amendment to the Bill could be made showing that the other action is neither between the same parties, nor does the Bill ask the same relief, nor can the court entertain the Bill for that complainants, most of them, if not all, have no estate of inheritance in the land and are not capable of suing even for the part they do sue for.

The plea is bad if it states, i. e., "the same material parties, or substantially the same object:"

Emma M. Co. v. Emma M. Co., 1 Fed. 39.

Foster v. Vassall, 3 Atk. 590.

Wabash Co. v. Central Co., 23 Fed. 513.

Suit in State Court no bar in Federal Court though same parties and same cause of action.

Stanton v. Emboy, 93 U. S. 548.

Gordon v. Guilford, 99 U. S. 168.

Washburn v. Scutt, 22 Fed. 710.
Ins. Co. v. Brune, 96 U. S. 588, 592-3, L. Ed. 737.
Memphis v. Dean, 8 Wall. 64 (326.)
Thorne v. Towanda T. Co., 15 Fed. 289-92.
Radford v. Folsom, 14 Fed. 97.
In the last two cases both suits were permitted.
Sharon v. Hill, 22 Fed. 28.
Coe v. Aiken, 50 Fed. 640 (May, 1892.)

The Gist of the Case.

Because of the vast multitude and variety of claims to the property to be partitioned in this case, ranging from absolute and undoubted titles in fee simple, down to the shadowy claims of contingent titles, and overlapping grantees whose boundaries are uncertain, it was deemed impossible to procure partition unless the titles and liens were marshaled and the good sifted and winnowed from the bad.

The land to be partitioned is 10,016 acres known as the John T. Lowe Grant in Volusia County, Florida.

The grant was by the Spanish government to John T. Lowe in 1816 during his coverture with Susan Lowe his wife who it is claimed, became and was vested by ganancial right with title to the undivided half of the whole grant.

Art. viii, Treaty with Spain Feb. 22nd, 1819.
Thompson's Digest 572.
McClellans' Digest 754.

John T. Lowe died about 1824, leaving six heirs surviving, some of whom have made imperfect and void papers called deeds and powers of attorney as well as good and sufficient deeds, until it is a matter of great difficulty to decide who are actual tenants in common. The partition would be unstable and uncertain unless all of these grantees had their day in court.

The prayer to quiet title is of little or no moment provided the claimants are all before the court and have their day in court to obtain in severalty whatever they may be entitled to, or to be denied any participation if they cannot establish their claims.

The complainant alleges he has been in actual posession for several years and has paid all the taxes that have been paid, and has been to expense preventing waste and injury to the freehold; has expended money for counsel fees, and to discover the legal co-parceners, all of which is of equal value to all the co-parceners and chargeable to and payable by each of them in proportion to their share in severalty.

The Bill sets out the names and citizenship as well as residence of all the claimants; a full description of all the property and its value—the genealogy of the heirs of John T. and Susan Lowe—a brief abstract of the conveyances down to the last or present grantees, and a carefully prepared estimate and statement of the shares of all the last actual grantees—and for the sake of brevity instead of setting out that certain of the defendants will set up claims that they are entitled to share the proceeds, and then stating why they are not entitled, an abstract of the claims of all grantees is set up and the defects in their titles stated and they are omitted from the distribution. The prayer is for answer to the Bill and to certain specific interrogatories—for construing the deeds and apportioning to those entitled—to bring in all claimants and lien holders—for partition, if possible, and if not possible or equitable, for sale and distribution of proceeds—that advances and expenses be paid—that commissioners be appointed—and for general relief—and for subpoena.

This Bill has been elaborated and perfected as near as may be, and is believed, with a few minor amendments, to be as accurate and complete as it can possibly be made.

This forum was selected because it is believed to be the most disinterested, unbiased and independent, and also because it was certain that some of the defendants would insist on removal from the State Courts if the Bill should be filed there, thus entailing delay and expense and eventually defeating partition.

Partition will never be made of this property unless it is quickly done, for the parties in interest are so numerous that it is now almost impossible to get them all into court, and in a few years the difficulty will be insurmountable. The slight errors already found in the names or residence and interests of the parties will multiply and become irremediable when this the third generation from the ancestor, now near its end, gives way to the fourth.

Defendants Tactics.

Many of these jurisdictional objections betray desperation and are a plain confession of weakness. They were found to be unworthy of mention in argument, but may be hinted at in brief and now will be disposed of.

It is avowed that the controversy in this case is not between citizens of different States, and that it is between citizens of different States:

That it is not brought in the district of residence of either the plaintiff or defendant, and that it is brought in the district of the residence of certain defendants:

That the court has not jurisdiction because some of the heirs are dead, and their estates are not settled up. The time will never again come when the estates of deceased heirs will all at any one period of time be settled up:

That the court has not jurisdiction to hear the controversy of adverse claimants, and that there is one adverse claimant who has been omitted and whose claim the court must hear:

That separate interests ought not to be set up in a Bill for partition, and that there are one or two separate interests not set up in this Bill, which ought to be set up:

That there is nothing in the Bill to show that the value of the property is sufficient to give the court jurisdiction.

State Sovereignty.

There are two distinct lines of decision on the jurisdiction of Federal Courts. One by judges who hold, or are for the time convinced, that the States are sovereign and the Federal government a mere agent with very limited powers. The other, that the United States is a Nation and has elements of sovereignty and prerogatives upon which the States can not encroach. The latter hold that the citizens of this country are citizens of the United States and are entitled to protection and security at home as well as abroad. They favor statutes, and if necessary, constitutional amendments, that will secure to every one of its citizens equality before the law and civil rights alike to all, whether to the manor born or beyond State lines. The very fact that constitu-

tional provisions and statutes to give citizens of other States the right to sue in Federal Courts have been found advisable and in fact necessary to guard against prejudice and local influence, is proof that the courts were not giving the protection and security to life, liberty and property that was due to the citizens of the Republic. And still ardent champions of State sovereignty manage to circumvent and nullify the Statutes, and even organic laws, intended to guarantee to the citizens of the United States sojourning in any State, the same legal rights and equal justice that the citizen of any State enjoys in his own State.

And so it is, that the Circuit Courts, and even the Supreme Court of the United States, have contradictory opinions upon the subject of their jurisdiction. The latter court has hitherto often been constrained to curtail the jurisdiction of the Federal Courts because it was overwhelmed with business, and every case it could keep out was kept out.

Because one case or even several may be found sustaining the view of defendants, is not therefore to be wondered at. I will endeavor to give an analysis of every case in point cited and an array of equally strong ones on the other side, and by applying the touchstone of reason and justice to each of them it is confidently hoped that this court will give the complainant here that protection and security which his citizenship of the great Republic guarantees, and ought to guarantee to him.

Federal Constitution and Statutes.

The constitution of the United States gives the complainants the right to sue in a Federal Court: They are citizens of different States from every defendant. Article 3, Section 2 Cl. 1.

The Statutes Arrayed, Analyzed.

Section 737 R. S. U. S.

Even in transitory actions, there may be defendants who "are neither inhabitants of nor found within the district in which suit is brought, and do not voluntarily appear, and the court may entertain jurisdiction, and proceed to trial and adjudication of the suit between the parties who are properly before it—and non-joinder of parties who are not inhabitants of nor found within the district as aforesaid shall not constitute matter of abatement or objection to the suit."

This applies to any actions transitory or local. See Desty's Fed. Prac. and his notes to this section, including many local actions.

In section 738 R. S. U. S. which has never been repealed, "in any suit to enforce any legal or equitable lien upon, or claim to, or to remove any encumbrance, or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants, to appear, plead, answer or demur, by a day certain to be designated, which order shall be served on such absent defendant wherever found"—in person or by publication.

If "not actually personally notified" they have a year after final judgment to appear and set aside the judgment—"and on payment of such costs as the court shall deem just—said suit shall be proceeded with to final judgment according to law."

18 U. S. Stat. 472; 1 Sup. R. S. 776. See 8

Section 739 R. S. U. S. seems to contradict and deny all the provisions of sections 737 and 738. The citations under section 739 are calculated to mislead into the belief that: "A Federal Court acquires jurisdiction over parties only by service of process, or by their voluntary appearance, and only by service of process within the jurisdiction!" Such is the language of the decisions—but the actions are all transitory in which such decisions are rendered, and none of them are "to enforce any legal or equitable lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought," as is provided in section 738. By losing sight of the distinction between transitory and local actions, the court has followed the law as laid down for transitory actions. Other courts have been misled, and decisions exist which would require this court to dismiss this action, if they are to be followed. But they are not to be followed unless a bad decision is to be followed as surely as a good one.

Section 740 also enlarges the limits of section 739. If there are two districts in the State, and two defendants, one in each district, the

suit though transitory, may be brought in either district, and the other defendant served in the other district. Here we have a defendant brought in from another district from that where he resides or is found.

Section 742 is where land lies in different districts of same State—suit may be brought in either district and defendants served in either district, and final process issued to either district—because the suit is of a local nature.

It is clear therefore that it makes all the difference in the world whether the action is local or transitory. If local it must be brought in the district or a district, where the land lies. If to "enforce any claim to, or remove any cloud upon the title to real property within the district where such suit is brought", otherwise local, process, either actual or constructive, will issue to other districts. The only pre-requisite is that the plaintiff (or complainant) must not reside in the same district as any defendant with whom he has a controversy.

Original Process and Substituted Process.

Please take notice that the First Section of the Article of Mar. 3. 1875, 18 St. 470, contains the very guarded and at the same time pregnant phrase, "that no civil suit shall be brought in either of said courts by any ORIGINAL PROCESS OR PROCEEDINGS, ETC,." which does not forbid, or even limit, the bringing of suits by SUBSTITUTED process, as was provided in Section 8, of the same act. It is said the courts have never so ruled: I answer, it is because the case before them did not require them to rule, for in every case that will be cited, holding apparently to the contrary, no substituted process was applicable, for in actions upon contract, in tort, or any other ending in judgment and excution nothing but original process actually served on the person or at the residence will justify a personal judgment and excution.

The new section 1, Act of 1888, contains the same expression, "original cognizance," also by "any original process or proceeding etc."

Jurisdiction in Equity Land Cases.

The process of the Circuit Court will run throughout the United State to adjudicate liens or interests in lands regardless of the citizenship of either plaintiff or defendant being in the district where the land lies.

Section 1, Statute August 13th, 1888, has no application where the

cause of action is strictly local. except as to diverse citizenship and amount.

Bourke vs. Amison, 32 Fed. Rep. 710.

Notice the words in the statutes of August 13, 1888—"Where jurisdiction is founded ONLY &c."

Defendants' counsel have expunged that hateful word "only" from their copy of this statute!

If there are parties whose interests are severable, and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained and the suit dismissed as to them.

Horn vs. Lockhart, 17 Wall. 570—L. Ed. 657.
Breedlove vs. Nicolet, 7 Pet. 431.
Vattier vs. Hinde, 7 Pet. 252.
Gould and Tucker's Notes 96.

Section 738 R. S. (Sec. 8 of Statutes of March 3rd, 1875 expressly saved by Section 5 of Statute, 1888,) is so framed that in suits where the object is to subject property within the district, a non-resident defendant whether sole defendant or one of several, may be brought into court by service anywhere, or by publication.

Gould and Tucker's Notes 209–10.

"This act is a remedial statute, and should be liberally construed to accomplish the end in view."

McBurney vs. Carson, 99 U. S. 567—L. Ed. 378.

This question has been examined on all sides by certain able Federal Judges including those of the Supreme Court.

In County of Yuba vs. Pioneer G. M. Co. 32 F. 183 Sawyer J., Field J. concurring, held that the act of 1887 or 1888 did not permit a defendant in any civil suit at law or equity to be sued "in any other district than that whereof he is an inhabitant."

In the same Reporter Fales vs Chicago M. & S. Ry. Co. 673 Sh.ras J. dissented from and overruled Sawyer, Field and Sabin, citing them with disapproval.

In Gavin vs. Vance, 33 F. 84, Hammond J. although bewildered by the Yuba case which was cited, proceeded to show the absurdity and inanity of the act of 1887 "if the case above cited has put the proper construction on the act," and shows that no suit could be removed un-

der that act. How absurd then to pass an act for removal if no removal could be had under it? He avers that under that case only suits in which the jurisdiction depends upon the subject matters of the suits, and not the diverse citizenship of the parties, are removable." If in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought, even the Yuba Co. case will not forbid suing a defendant out of his district.

He then goes on to show that the act provides for the very party, "and the only party who could remove, namely: 'The defendant or defendants therein being non-residents of this State,' that is to say of the State where suit is brought."

He overrules the Yuba Co. case.

J J. Gresham, Brewer, Coxe, Wallace, Lacombe and others go contrary to the Yuba Co. case. See:

Loomis vs. N. Y. & C. Co. 33 Fed. 353.

St. Louis Co. vs. Terre Haute Co. Ib. 385.

And at last in:

Wilson vs. W. U. Tel. Co. 34 F. 561.

Field J. admits that his decision in the Yuba Co. case was wrong and reverses it.

These cases clearly decide that a defendant may be sued in a district where he does not reside.

It is surely noteworthy that Field J. who reversed himself in this last case was a Justice of the Supreme Court of the United States.—Great men are sometimes mistaken; fools never.

See Ober vs. Gallagher 93 U. S. 199, 23 L. Ed. 831.

In Meyer vs. Del. Con. Con. 100 U. S. 437 (598) there was a citizens of Iowa against another (citizen of Iowa?) and citizens of Pensylvania and Ohio.

Court held it had jurisdiction.

In Goodman vs. Niblack, 102 U. S. 562 (232) Goodman's residence is not disclosed, but he was not a citizen of Indiana, because Niblack resided in Indiana where suit was brought. Sloo resided in another State, and had not been made a party because he was supposed unnecessary. The court held he was a necessary party, should be brought in, "and that his presence would not defeat jurisdiction"—construing Section 738 (see last page.)

See Ames vs. Holdnrbaum, 42 Fed. 341.

Carpenter vs. Talbott, 33 Fed. 537.

Jewett vs. Branford &c. 45 Fed. 801.

McBee vs. Railway Company, 48 Fed. 243.

All holding that in certain cases affecting real or personal property in the district, defendant OUT of the district may be brought in and Federal Courts have jurisdiction.

Barney vs. Latham, 103 U. S. 205; L. Ed. 514.

Original suit in State Court of Minn., plaintiffs citizens of Minn. and Indiana. Defendants citizens of New York, Wis., Mass. and a Minn., corporation, for an account and for partition of lands in Minn.

Petition for removal by defendants to Circuit Court of United States. On motion to remand for want of jurisdiction, that court ordered it remanded and the said defendants appealed to the Supreme Court of United States.

The questions were First: "Is this suit removable upon petition of citizens of N. Y., Wis. and Mass? Second: Does the fact that the Land Company one of the defendants, is a corporation of Minn., of which State one of plaintiffs is a citizen, prevent a removal to the Circuit Court of the United States?"

The Supreme Court held that the Circuit Court had jurisdiction and reversed the court below with orders to re-instate the cause and try it.—Answering the first question Yes, second question No! The reason is that there was a controversy between the plaintiff citizen of Indiana, and the defendants citizens of Minn. and New York, separable from the controversy between the co-plaintiff citizen of Minn. and the defendants, and that plaintiff from Indiana had the right to be heard as against defendants from other States than Indiana, even although a co-plaintiff citizen of the State where suit was brought had another controversy with a citizen of the same State, deciding the exact question, exactly contrary to the defendants' contention, and exactly the reverse of the court below in the case at bar.

In Horn vs. Lockhart, 17th Wall. 570 L. Ed. 657.

Bill filed in S. D. Ala., by citizens of Texas against citizens of Alabama and Texas. The citizens of Texas were dismissed so as to avoid the prohibition of the Statute that the opposing parties must be citizens of different States. Their dismissal was approved of on appeal, and

the jurisdiction sustained. The complainants were not citizens of the State where suit was brought.

No case in equity can be found in the Supreme Court reports, where the court has held that all the defendants must be citizens of the same State, where liens upon or claims to land were in controversy.

This court is full of cases and decrees where land, railroads or property in the State is in controversy, and the defendants are citizens of other states than this, and are citizens of several States.

To hold that a citizen of another State than Florida cannot be sued in this court respecting property in Florida, one or more defendants being also citizens of Florida, is to ignore and nullify section 738 R. S. U. S., and to jeopardise the right and title to vast properties which right and title was supposed to have been settled by this court, but must now be upset!

Section 738 R. S. U. S. is Not a Dead Letter.

If the position assumed by defendants' counsel as to the suit being tenable only in the district of the residence of the complainants or defendants, is correct, then section 738 of the R. S. U. S. is utterly nugatory. Why should Congress provide for service by publication to bring in defendants who reside out of the district if they cannot be sued out of the district of their residence?

Sections 738 and 739 R. S. of 1878 of themselves fully answer defendant's brief and argument.

The act of 1888 does not repeal, or modify these sections. They are specially excluded from the operation of that act. See section 5.

The court will please turn to original section 8, of the Act of 1875 which is specificially preserved by section 5 of the Act of 1888, for it is more inclusive than section 738 R. S.

Subpœna Unnecessary.

A marshal's return of "not found," is not a condition precedent to an order for substituted service; but such absence may be shown by affidavit. The court may fix any day certain for the appearance of the non-resident defendant.

Forsythe vs. Pierson, 9 Fed. Rep. 801.

Castello vs. Castello, 14 Fed. Rep. 207.

It is not necessary to follow the State practice.

Id. Gould and Tucker, 211, 512.

Analysis of Appellees' Authorities.

In Smith vs. Lyon, 133 U. S. 315, the court construes section 3 of the act of March, 1887. It never refers to section 8. It quotes Strawbridge vs. Curtis, 3 Cranch as if that case was still in full force and unreversed, unfortunately forgetting that Congress as early as 1839 had passed an act to get rid of that decision, to-wit: Section 737 R. S. of 1878, supplemented by Section 738, re-enacted Section 5 Act of 1888, to render that descision nugatory thereafter—as the court in Ober vs. Gallagher, 93 U. S. 199 (23rd 831) say with respect to the act of 1839 it "was passed exclusively with an intent to rid the courts of the decision in Strawbridge vs. Curtis, 3 Cranch 267, which with that of Bank vs. Deveaux, 5 Cranch 84, had never been satisfactory to the bar."

The case simply decides what was before the court—that where the action was transitory and could be brought in one State as well as another if residence was according to Statute, one of the plaintiffs and the defendant being non-residents of the State where suit was brought, the Federal Court had not jurisdiction.

Boyd vs. Wyly, 8 S. C. Rep. 364, January, 1888, From Circuit Court United States W. D. Louisiana:

Mary R. Boyd by her son and next friend F. W. Boyd, citizens of Winconsin, against W. G. Wyly and Charles Egelly, citizens of Louisiana, and the executor of James Railly of Mississippi. Bill in equity to set aside sale of real estate in Louisiana:

Citizens of Wisconsin complainants, against citizens of Louisiana and Mississippi—jurisdiction taken, and case decided on its merits.

Holland vs. Challen, 110 U. S. 15.

Bill in equity in Circuit Court of United States for Nebraska, by a citizen of Mass. against a citizen of Ohio, to quiet title to land in Neb.

Case decided on its merits; court taking jurisdiction, which it could not and would not do, by mere consent of parties, if the court did not inherently have jurisdiction.

I have read the Bill of Complaint in this case. My wife was defendant. I certify on knowledge that the citizenship is as above stated.

Roberts vs. Lewis, 12 S. C. Rep. 781.

A citizen of Wisconsin sues a citizen of Nebraska for possession of real estate in Nebraska, in the Circuit Court of the United States for Nebraska. The court had jurisdiction if this were so. But defendant denied that plaintiff was a citizen of Wisconsin and that defendant was a citizen of Nebraska, which under the Nebraska practice, made it incumbant on plaintiff to prove these facts as they were made material by such denial. The failure to prove them was the cause of the reversal of judgment. The court simply intimates that if the proof establishes that plaintiff and defendant were both citizens of the same State, the case must be dismissed for want of jurisdiction. Nobody denies this.

Defendants' counsel citied Roberts vs. Lewis, decided April 25th, 1892, with great gusto as riveting their argument if not clinching it. Strange! The only principle decided is that where a plaintiff alleges citizenship in a certain State, and defendant denies every allegation, the plaintiffs must prove citizenship as alleged, or the plaintiff fails for want of evidence, because the allegation of citizenship is a material allegation. The judgment was reversed—plaintiff on a new trial to offer evidence of the citizenship of the parties. Nothing more, and not a sentence bearing upon the issues joined in the case.

Con. Ins. Co. vs. Rhoades, 119 U. S. 237.

Was a case where plaintiff omitted to state his citizenship. Remanded for amendment.

In Blake vs. McKim, 103 U. S. 336.

Pen. I. Co. vs. Stone, 121 U. S. 651.

There were defendants who were citizens of same State as plaintiffs. United States Court had no jurisdiction.

Pac. R. R. Co. vs. Ketchum, 101 U. S. 289 (25 L. E. 932) holds specifically p. 300. "Clearly the controversy was between citizens of one or more States on one side and citizens of other States on the other side, and when the decree was rendered the only thing to be done was to foreclose the mortgage aued on as between the trustee of the mortgage and the railroad. Of such a suit the Circuit Court had jurisdiction, and its decree is consequently binding on the parties until set aside in the regular course of judicial proceedings."

Here is a case where there were citizens of more than one States on

one side, and citizens of other States besides the State in which the suit was brought, on the other side.

The decree was granted and affirmed on appeal.

Carson vs. Hyatt, 118 U. S. 279; 35 L. Ed. 157, was from S. C.

Plantiffs were citizens of New York and Spain; defendants citizens of South Carolina and Mass. The citizen of Mass. filed a petition for removal and arrayed the citizens of New York, Spain and South Carolina on the other side. The controversy was concerning land in S. C. The citizen of Mass. had been served by publication. The case was removed, but on motion to remand for want of jurisdiction, the Circuit Judge remanded to the State Court, and the Mass. petitioner, Carson, appealed to the Supreme Court of the United States.

The State Court proceeded to try the case so remanded, and decreed against Carson; she appealed to the Supreme Court of the State on the ground that the the State Court had no right to proceed while the the case was in the Federal Court. The State Supreme Court affirmed the decree of the court below, and she appealed to United States Supreme Court where the case was heard on double appeal from the Circuit Court of United States and Supreme Court of South Carolina. This court reversed both of the latter, holding that the Federal Court had jurisdiction! The real complainant was a citizen of Mass.; defendants citizens of S. C., New York and Spain.

Appellees' Positions Attacked.

Complainant in partition is never bound to UNITE any other coparcener as co-complainant. No court can compel him to array any one on his side. He has an absolute, indefeasible right to sue.

Rich vs. Bray, 37 Fed. 273 overruled or contradicted by
Belding vs. Gaines, 37 Fed. 817–18.

That the Federal Judges of one district do not feel bound to follow blindly those of another district is illustrated by Rawley vs. So. Pac. R. Co., 33 Fed. 305–7, where Judge Sabin refuses to follow County of Yuba vs. Mine Co., 32 Fed. 183, on this very question of jurisdiction. Take notice that this case in 32 Fed. was reversed and set as naught in Wilson vs. West. U. Co., 34 Fed. 561 by Field J., the same who at first concurred in the 32 Fed. case; thus justifying the refusal of a judge to ratify what he saw was a false principle.

33 Fed. 307 and 34 Fed. 564–5.

Pacific R. Co. vs. Ketchum, 101 U. S. 289 is in point this far; some of the defendants there were citizens of the same State as complainant, and yet the Supreme Court affirmed the decree of the court below—holding that citizens of one or more States on one side and citizens of other States on the other side, gave the Federal Circuit Court jurisdiction.

Carpenter vs. Talbott, 33 Fed. 537 is criticised (page—brief.) Recklessness of statement is here again illustrated. The language of the court is denied and then it is cited to show that it says what they deny it says. They assert that "there are four parties to the Bill, each citizens of different States. No two of them are of the same State." The court say that: "The orator is alleged to be a citizen of Ohio, one defendant of Maine, one of New York, and others of Vermont." That is more than four, and two or more are citizens of Vermont. The unpalatable part of it is that the court holds that "Section 8 of the Act of March 3rd, 1875 which corresponds to Section 738 R. S. and confers jurisdiction in such cases, is expressly saved by Section 5 of the Act of 1888." The defendants made the same objection there that these do here. The case holds, contrary to contention of appellees, that the complainant need not reside in the district where the suit is brought, and that all of the defendants need not reside in the district where suit is brought, and that although the citizens of the same State may have a controversy with each other, that does not oust jurisdiction when the complainant is a citizen of another state than the defendants, as in the case at bar.

This is an absurdity to the defendants.

Jewett vs. Bradford S. B. & T. Co., 45 Fed. 801.

Is equally absurd although they cite it. A citizen of Mass., sues a citizen of Vermont and another of New York, in a Vermont Federal Court. Motion to dismiss for want of jurisdiction overruled.

The analysis of McBee vs. Railway Company, 48 Fed. 242 is equally faulty. There was a motion to dismiss because it is an original bill in equity, filed by persons claiming to be citizens of North Carolina, against citizens of Tennessee, citizens of Georgia, and a citizen of Mass., (page 245)—all lien holders and doubtless from the very nature of their claims antagonistic to each other—citizens of Tennessee claiming priority against citizens of Tennessee.

They insist that the Bill must be dismissed on the authority of McBee vs. Railway Company, although the court refused to dismiss in that case. But no matter what their cases hold, they demand that this Bill be dismissed although their cases are nearly all against dismissal.

In the case at bar the controversy, if there is one, is between a citizen of New Hampshire and citizens of other States than New Hampshire and he is entitled to have a hearing and decree in a Federal Court.

The case of Goodman vs. Niblack, 102 United States 556 which defendants cite with approval, was one dismissed by the Circuit Judge for want of jurisdiction, and reversed by the Supreme Court on the ground that Section 738 gave the remedy to bring absent defendants in. The court also authorized an amendment to the Bill to bring in new defendants.

Goodman could not have been a citizen of Indiana, for Niblack was such citizen, once a congressman from that State. Cheever and Wiles were not citizens of Indiana, for they resided in Cincinnati, Ohio, and yet the court ordered them brought in—and there you have a case where neither the complainant nor defendants were citizens of the State where the suit was brought. Miller J. held that their presence would not defeat jurisdiction because of section 738.

Pacific R. R. vs. Missouri P. Co., 3 Fed. 772 is in no respect in point. It was "not a suit to enforce any legal or equitable lien or claim against real or personal property," (page 774) and no affidavit was filed to obtain publication or process. The motion to vacate the service of process was granted. It seems strange that this case should be cited.

For defendants to say that Ames vs. Holderbraum, 42 Fed. 241 "fully supports our position &c." is most incomprehensible. This suit was in Iowa; land there; Ames, complainant, a citizen of Illinois, Holderbaum of Iowa, Henry and David Hochstella of Ohio. The case of Smith vs. Lyon was limited, distinguished—inapplicable. "Motion to dismiss overruled." The case at bar is no more governed by the defendants pet case, than the case just cited.

As to Parties Out of District.

Federal Courts uniformly hold that civil process will run to as many districts whereof the defendants are inhabitants, as there may be, regardless of the first section of the jurisdiction act which provides

that "Where the jurisdiction is founded only (note the word "only") on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." And the reason is that when the suit is in equity and relates to real or personal property within the district where the suit is brought, jurisdiction is NOT founded "only" on the fact that the action is between citizens of different States. The action can be brought no where else than where the property is. The court takes jurisdiction of the property. Hence the non-resident or alien has the constitutional, as well as the statutory right, to go into a Federal Court.

Bourke vs. Amison, 32 Fed. 710.
Fisk vs. Henarie, Ib. 423.
Meyer vs. Del. Con. Co., 100 U. S., 437, (598.)
Bingham vs. Luddington, 12 Blatchford, 237.
Bronson vs. Keokuk, 2 Dill., 499.
Parsons vs. Howard, 2 Woods, 1.
Kilgore's case Ib. 144.
Foot vs. Edwards, 3 Blatchford, 310.

Cases limiting or rather distinguishing Smith vs. Lyon, 133 U. S. 315 (635:)

Ames vs. Holderbaum, 42 Fed. 341.
Pennoyer vs. Neff, 95 U. S. 720 L. C. Ed. 565.
Insurance Co. vs. Bangs, 193 U. S. 441 (582.)
Carpenter vs. Talbott, 33 Fed. 537.
McBurney vs. Carson, 99 U. S. 567–9 (378.)
Goodman vs- Niblack, 102 U. S. 562–3.

And as to the necessity of a court of equity which has once obtained jurisdiction of the parties and "subject matter of the action for one purpose, retaining it for all purposes within the equities to be enforced:"

Ober vs. Gallagher, 93 U. S. 199 L. Ed. 83.
Equity Text Books, en loc.

These cases include partition cases. They relate as much to "property within the district" as foreclosures. It so happens that there are forty foreclosures to one partition. Hence, the above cases and many others like them, are generally foreclosures.

The contention of the defendants is that such cases may be brought, and the court MAY take jurisdiction. But the moment any two defendants of different district or even of the same district get to quarreling among themselves or with the plaintiff, that moment the Federal Court loses jurisdiction! "This would place the complainant at the mercy ofevery profligate or unconscientious defendant."

Overton vs. Woodfold, 6 Dana 374.

An analysis of the statutes and cases demonstrates that there is this distinction: When a personal judgment can be rendered on which process of execution CAN RUN to other districts than that in which the suit is brought, the defendant must be an inhabitant of or be found in the district in which suit is brought. When the judgment merely affects property within the district the defendants may be inhabitants of other districts, and they can be brought in by publication, and when in they must abide by the judgment, order and decree of the court between all the parties. And this is right.

In removal cases the courts array the parties according to their controversies if they are SEPARABLE, and not according to their places in the case, for the purpose of giving jurisdiction if any defendant has a controversy with another defendant or with one or more plaintiffs. But how unconscionable and absurd to permit defendants to trump up a controversy between themselves to kick themselves out of court? It is a notable fact that the cases cited to show why there should be a dismissal do not dismiss; for instance:

Beebe vs. L. N. R. Co., 39 F. 481.

Jewett vs. Bradford S. B. & T. Co., 45 F. 801.

McBee vs. Railway Co., 48 F. 243, and all the rest.

Counsel for defendants are bewildered by the language used by many judges in Removal Cases. That language really gives to any defendant who can separate himself from the other defendants and show a cause of action against any or all of the plaintiffs and defendants, the the right to remove a case against him from a State Court to a Federal Court. It is a right which demolishes the platform on which they build their hopes of ousting the jurisdiction of this court. A right the exact opposite of what they endeavor to make it. Applied to the case at bar it is, that if any of the defendants brought suit in partition against Greeley and he could show that he had a separate cause of ac-

tion which he could bring against them, he is entitled to a removal—regardless of the position of the parties, or of the other controversies of other parties as between themselves. This is Chief Justice Waites' interpretation of the meaning of the Removal Decisions. It is an interpretation of Removal Statutes, and not of Original Jurisdiction Statutes at all, but is just as destructive of their hopes.

Kennedy vs. Ga. St. Bk., 8 How. 586.

15 Meyers Fed. Dec. Sec. 935 Equity.

Speigle vs. Meridith, 4 Biss., 120–7.

15 Meyers' Fed. Dec. Sec. 1154.

Ober vs. Gallagher, 93 U. S. 199 is nowhere doubted, limited, or after due reference dissented from by the Supreme Court. The court say in this case that:

"Since the Act of February, 1839 it has never been doubted that the Circuit Courts had jurisdiction of a suit in equity of a local nature where a citizen of one State prosecuted citizens of other States in a district where the property in controversy was situated, AND OF WHICH ONE OF THE DEFENDANTS WAS AN INHABITANT." If one defendant was an inhabitant the complainant could not be. But in the first part of the same paragraph the court says that the Act of 1875, the 8th section of which is now in force as section 738 R. S. U. S. extended the jurisdiction of the Acts of 1789 and of 1839.

Try by the rule laid down, the parties to this suit. Greeley a resident of New Hampshire could sue any residents of Florida, or of Georgia or of Alabama, or of any other State and get an order to bring them in under section 738. Under former laws the court had held that unless they were served in the district where the land lay and where the suit was brought, or voluntarily appeared, the court would have no jurisdiction. Congress says: "It shall be lawful for the court to make an order directing the absent defendants to appear &c." Is not this language plain and easily understood? All decisions on this question prior to 1872 are therefore overruled by this Act of Congress of 1875.

"The question here presented cannot be one of practical importance in the future as the Act of 1875 has extended the jurisdiction of the Circuit Courts—using the very words of the Constitution &c."

Ober vs. Gallagher, 93 U. S. 199 (L. Ed. 830.)

R. R. Co. vs. Latson, 2 How. 497–556.

Torrence vs. Shedd, 12 S. C. Rep. 726, Reported April 11th, 1892, will probably be cited as it was to the court below at the last moment and seemed to have some weight in the scale. The case simply decides, that as the complainant had a controversy with all the defendants involving his title which was denied by the defendants, that controversy had to be first decided and it was not separable as the presence of all the parties was requisite and a decree could not be entered unless all parties were in court. Hence the removal on the ground of a separate controversy between complainant and a new defendant on a side issue involving equities between this new defendant only and complainant, which could never be reached or considered until the prior controversy affecting the title of the new defendant and the complainant was ended, was contrary to the meaning of the Removal Statutes. Besides that this new defendant and complainant settled their controversy before the hearing, and a motion was made to remand, as there was nothing left for the court to stand upon. The overruling of that motion was held to be error. The removal on an incidental and unfair issue was held to be error. No point in the case at bar was touched.

As to Greeley and Warner.

In Belding vs. Gaines, 37 Fed. 817 Brewer, J. says:

"The complainant is one of the heirs, and files this Bill claiming as against such defendant a one-fourth interest in the property, and as against all of the defendants—the other heirs being made defendants—partition. Such other heirs file a cross-bill, claiming their separate ownership of one-fourth interest, and also asking partition. It is insisted that the interests of these two defendants are the same as those of the complainant, and that they are collusively joined as defendants for the purpose of giving this court jurisdiction; that the court should ignore the action of the pleader, rearrange the statutes of the parties litigant, and place such last named defendant on the side of the complainant; and so placing them, there would be a suit between citizens of this State, of which this court would not take jurisdiction. I think this is a mistake. It may be true that the complainant and the two defendants are alike interested in divesting the other defendant of whatever right and protection he may claim from holding the legal title, but there their identity of interest ceases. Each seeks to recover for himself, and not for the three jointly, his one-fourth share of the property. Partition implies a setting

apart to each owner his hitherto undivided interest AND EACH OWNER HAS A SEPARATE INTEREST IN ESTABLISHING THE FACT AND EXTENT OF HIS TITLE, AND IN SECURING HIS SEPARATE SHARE OF THE ESTATE."

And Caldwell the District Judge, concurs with him delivering a very strong decision approving the placing of a party as defendant instead of as plaintiff because it gave the court jurisdiction and showing the difference between the Removal Statute and the Original Jurisdiction Statute.

Appellee's Cases Dissented From and Explained.

In Ames vs. Holderbaum, 42 Fed. 341, complainant was a citizen of Illinois, one defendant a citizen of Iowa, two defendants citizens of Ohio, and the property was in Iowa where of course, suit was brought. and Shiras, J. says:

"The motion to dismiss is based upon the theory that under the statute of August 13th, 1888, the jurisdiction of the Circuit Court of the United States is based solely upon the diverse citizenship of the adversary parties, and that, under the construction given thereto by the Supreme Court in the case of Smith vs. Lyon, 10 Sup. Ct. Rep., 303 or 133 U. S. 315, L. C. Ed. 635, this court cannot take jurisdiction of this cause, because two of the defendants are citizens of Ohio. If this suit was a purely personal action, wherein the place of bringing the suit was dependent upon the residence of the parties, the objection urged to the jurisdiction would have weight; but is the rule recognized in Smith vs. Lyon applicable to suits for foreclosure of mortgages on realty, wherein the place of bringing suit is determined by the location of the realty covered by the mortgage? Under the statutes of Iowa, the mortgagor retains a legal title and right of possession of mortgaged realty, and proceedings for the foreclosure thereof, must be brought in the county wherein the realty or some part thereof, is situated. The decree operates in rem, and may be rendered without personal service upon or jurisdiction over the person of the mortgagor, and the suit is therefore to be deemed to be local in its nature."

2 Jones, Mortg. Sec. 1444.

"When the suit is of a purely personal nature, the place of bringing suit, when jurisdiction depends solely upon the diverse citizenship of the parties, is by the act of 1888 restricted to the districts wherein the plain-

tiff and defendants reside; and unless all the plaintiffs reside in one district, suit cannot be brought in that district. Nor, unless all the defendants reside in the same district, can suit be brought therein, because the statute does not confer the right to bring the suit in a district wherein a part only of the defendants reside."

"In Smith vs. Lyon, it is shown that this has been the construction placed upon the judiciary act of 1789, and all succeeding acts regulating the jurisdiction of the Circuit Courts. In the acts of 1875 by section 8 thereof, it is provided 'that when, in any suit commenced in any Circuit Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear,' etc. This section clearly recognizes and confers the jurisdiction to proceed in the class of cases therein named, which includes the foreclosure of mortgages, even though one or more of the defendants was not an inhabitant of the district wherein the suit was brought."

The only point in Anderson vs. Watt, 138 U. S. 694, 34 L. Ed. 1078 is that one defendant was a citizen of same State as real complainant. No jurisdiction of course. Covert vs. Waldron, 33 F. 311, dismissed on general principles, nor very good ones either.

The Law As It Is Under Section 738.

Wheelwright vs. St. L. Trans. Co. 50 F. 710, Louisiana Case.

"This is a case brought to foreclose a mortgage, and to have the mortgaged property preserved pending the suit. The complainant is a citizen of the State of New York, and the defendant is a citizen of New Jersey. The mortgaged property is situated within this district.

The first question presented is by an objection to the jurisdiction, which is urged in support of general demurrer, on the ground that neither party is a citizen of the State within which the action is brought. It is urged by the defendant that the effect of the act of August 13th, 1888, (25 St. p. 433,) is to deprive this court of jurisdiction. To this objection the complainant replies that this suit is brought and jurisdiction is conferred under and by virtue of section 8 of the act of March 3rd, 1875, which section is by section 5 of the act of 1888 ex-

pressly continued in force as if that last statute had not been passed. Section 5 of the act of 1888 (25 St. p. 436) is as follows:

"Sec. 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-three or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States, or mentioned in section eight of the act of congress of which this act is an amendment, or in the act of congress approved March first, eighteen hundred and seventy-five, entitled 'An Act to protect all citizens in their civil and legal rights.'"

The reservation as to section 8 of the act of 1875 is full and complete, and the only question remaining upon this objection is whether section 8 of the act of 1875 (18 St. p. 472) confers jurisdiction upon the Circuit Courts where there is but one defendant, and neither party resides within the State in which the suit is brought. Section 8 of the act of 1875 is as follows:

"That when, in any suit commenced in any Circuit Court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain, to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be," etc.

"It would seem that this expression, 'one or more of the defendants,' means one defendant, if there is but one, or one or more, if there are several; for the necessity of the provision springs out of the fact that the RES upon which the lien is sought to be asserted and enforced is located in a district not that of the defendant's domicile. If another defendant resides in the district, it would still leave an equal necessity for the provision as to the non-resident defendant. In this class of cases, it is the residence of the defendant away from the property sought to be affected which is the reason for conferring the jurisdiction; for the property must be in the district where the court sits, so that it can lay its hand upon it to enforce the lien. This would be equally true whether there was one or more defendants, or whether some of them were residents."

Adverse Titles.

It will doubtless be claimed as below that the court has not jurisdiction in this particular case, because there are adverse titles set up in the Bill which must be disposed of before partition can be made.

This question could hardly come before this court because the pleas, motions and demurrer reach only to the jurisdiciion as a Federal question and not as to the chancery jurisdiction of courts in general. If it is to be considered, or even passed upon incidentally, the court should be well advised, for this reaches the full merits of the whole case. A very few out of a whole host of cases, and a limited citation of the conclusions of authors, will be submitted, lest silence might be misconstrued. The views of this Appellate Court will be accepted upon the main subject of reciting the claims of adverse claimants for the purpose of testing the merits of their claims.

"If the object of the suit be single, but it happens that different persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such different persons must be brought before the court, in order that the suit may conclude the whole subject."

Salvidge vs. Hyde, 5 Maddock 146 and 89–94.
Foster's Fed. Pr. 122.
Lehigh Co. vs. N. J. Co., 43 Fed. 548.
Tate vs. Norton. 94 U. S. 749, L. Ed. 223.
Payne vs. Hook, 74 U. S. 425, L. Ed. 260.
Tate vs. Hambly, 2 Atk. 363.
Brinkerhoff vs. Brown, 6 John's Ch. 157.
Black vs. Shreeve, 7 N. J. Eg. 440.
1 Pomeroy Eq. Jur. 299.

The opposing counsel cited Beebe vs. L. N. O. P., 39 Fed. 481.

This case dismissed the railroad company because it held or claimed to hold under a title adverse to all the co-tenants and in no way derived from them or their ancestors in title.

Chapin vs. Sears, 18th Fed. 814.

In this case complainant does not aver that he was in possession. Read the last two sentences, if you read the case. His legal title was evidently denied.

And in contra-distinction see

Lucas vs. King, 2 Stock. Ch. 280.
Overton's Heirs vs. Woodfolk, 6 Dana 374.
Freeman on Co-Tenancy, Sec. 502–531.
Phelps vs. Green, 3 Johns. Ch. 306.

And as to State legislation being followed by Federal Courts, if it enlarges the remedy, or extends the powers of Chancery Courts.

U. S. vs. U. P. R. R., 98 U. S. 569, L. Ed. 143–151.
Brine vs, Ins. Co., 96 U. S. 627–40–1, L. Ed. 862.
Ins. Co. vs. Cushman, 108 U. S. 61, L. Ed. 648.
Allis vs. Ins. Co., 97 U. S. 144, L. Ed. 1008.

In Florida, the Partition Act, McClellan's Digest 801 does not take away any of the powers of Chancery Courts. It adds to them. The terms of the act show this, and the Supreme Court in Bird vs. Bird, 15th Florida, 424–45 says:

"The court is invested with all the cumulative powers created by the statute, and retains all chancery attributes except as otherwise provided by the act."

It permits joint tenants, tenants in common, co-parceners, to seek partition, section 2; and requires not only co-tenants and co-parceners, but other persons interested in said lands, to be made defendants, and that "the Bill shall set forth the description and the names and places of residence of the several owners or other persons interested in said land, the quantity or proportionate share held, or claimed by each, and such other matters (if any) as may be necessary to enable the court to adjudicate fully upon the rights and interests of the parties."

This act and the additional powers granted by the act of 1889 page 125, may be administered in a Federal Court. Such court is not bound by them but it will enlarge its powers as far as the State Court could do under the same statutes, for the promotion of justice and to give cumulative and additional relief according to the spirit and purpose of the acts.

Aspen Mining & Smelting Co. vs. Rucker, 28th Fed. 220.
Gormley vs. Clark, 10 Sup. Ct. Rep. 554–6–7. (Mar. 1890).

For the sake of brevity the old chancery form of setting up that certain defendants naming them, will set up certain titles, and then reciting why those titles are bad, was deviated from, and the titles set up, with certified copies of their deeds or documents, their flaws pointed

out, and the construction of the court asked. If the roundabout and prolix forms of chancery had been followed the Bill would have been much more tedious than it is. The same facts are before the court and the same conclusions may be arrived it.

Complainants aver positively that they are in possession and those whose titles are attacked are not in possession.

Possession follows the legal title and is never presumed in favor of an illegal or imperfect title, bond, or contract for title.

Cochran vs. Shoenberger, 33 Fed. 397, also cited and approved by appellees' counsel says: "There is no lack of authority for the proposition that in cases of partition, a court of equity administers its relief ex equo et bono, and by its decree adjusts the equitable rights of all the parties" &c. &c.

Partition Is In Rem.

The citation of Hart vs. Samson, 110 U. S. 151 (28 L. E. 101) by defendant's counsel is a desperate act. The question was not before the court, and all it says about actions in REM, and actions in personam is coram non judice, but the court does not say that "Partition is not in rem but in personam" as defendants asserts.

It does say that equity jurisdiction is generally if not universally exercised in personam and not in rem (sic.) It evidently found that the statutes of Texas had not authorized the title to be quieted—that the decree was not specific, and was no doubt a fraud and wrong. The case cited are of the same character. The gistof the decision is, strange to say, that the judgment of the Texas court would be allowed no force in the courts of another State and none in a court of the United States. Desperate cases make strange law sometimes. At any rate, the decision is not in contravention of section 738, for that question, as to a Federal Court, was not before the court.

If the question before the court is one of title, it must be tried where the land lies, if it is one of fraud, trust, or contract it follows the person. The distinction is plain, but is not always observed.

Contradicting, limiting or explaining Hart vs. Samson, see:
Arndt vs. Griggs, 10 Sup. Ct. Rep. 557.
Morris vs. Graham, 51 Fed. 53, Fla. 1892.

Boswell's lessee vs. Otis, 9 How. 336.

Huling vs. Railway Co., 130 U. S. 559; 9 Sup. Ct. Rep. 605.

Mellen vs. Iron Works, 131 U. S. 352.

The doctrine that chancery acts IN PERSONAM and not IN REM, is practically annihilated. That doctrine may be good in theory, but is not followed in practice—actions to quiet title, partition real estate, cancel deeds, condemn real estate for railroad or public purposes, for specific performance, are all treated as sufficiently in rem to justify decrees upon service by publication, which is approved and enforced, and the Statutes of States authorizing substituted service are called to the aid of Federal Courts. Florida Statutes provide for such service as Judge Locke shows in Morris vs. Graham, and other States also as Brewer J. recites in Arndt vs. Griggs. But where they limit the power given by section 738 R. S. U. S., the State Statutes are ignored.

An action for partition being a proceeding IN REM, must be brought in the district or county where the land lies.

17 Am. & Eng. Encyc. of Law, 707 a.

75 Am. Dec. 781.

Pennoyer vs. Neff 95 U. S. 714–746, 24 L. Ed. 572, last paragraph of second column.

A foreign court may order and decree a deed, but cannot give possession—it could not, therefore, make partition.

Muller vs. Downs, 94 U. S. 444.

Massie vs. Hart, 6 Cranch 148.

4 Minor's Inst. 1201.

A bill for partition of lands situate in Ireland will not be entertained in the Court of Chancery in England, because IT IS IN THE REALTY; and, the court cannot award a commission into Ireland.

Storey's Eq. Sec. 1292.

"In the realty" is an apt translation of IN REM. Partition—"it is in rem."

Suits to Marshal Liens and Claims.

They are in rem, local, and lie only in the district where the property is.

"A suit in chancery by one who has the prior equity against him who has the eldest patent" (to quiet title) "is in its nature, local, and if it be a mere question of title, must be tried in the district where the land lies."

By Marshall, Ch. J. in Massie vs. Watt, 6 Cranch, 148, (L. Ed. 181.)

Partition may be ordered if plaintiff is seized, whether the land is claimed adversely to him or not.

Bonham vs. Weymouth, 39 Minn. 92, 42 Am. Dec. 422, 18 Atlantic 774.

Ormond vs. Martin, 37 Ala. 598.

Griffin vs. Griffin, 33 Ga. 107.

Briet vs. Leaton, 101 Ill. 242, 119 Ill. 298.

Gage vs. Bissell, 104 Ill. 509.

Shutz vs. Greve, 102 Ind. 173.

The case of Keil vs West, 21 Fla. 508 goes a step farther and holds that when complainants aver they are seized in fee—that no one else is interested, except one defendant, who is in possession and claims some interest in the premises, and that she refuses to set forth her interest or join in partition, and the Bill prays that the shares belonging to any of the parties may be ascertained and settled and partition made—the relief will be granted and partition ordered.

This case also on page 525 interprets Street vs. Benner to mean that the court "CAN ascertain and adjudicate the rights and interests of the parties and decree a partition if it shall appear that the parties are entitled to the same without requiring the legal title to be first tried in a court of law."

It follows that view of Street vs. Benner, 20 Fla. 700.

Partition Defined.

M'Claskey vs. Barr, 48 Fed. 134.

"Every co-tenant interested in the land sought to be partitioned must be made a party to the suit, and the partition must be complete; that is to say, must include all the interests of all the co-tenants. It is not, in any true sense, an adversary proceeding. Each co-tenant asks for the allotment of his portion, upon the understood condition that he allow the allotment to every other co-tenant of his portion. The cases

which sustain this proposition are noted under section 156 of Langdell on Equity Pleading. and they proceed distinctly upon the theory that the court entertains such bills only upon the condition that the plaintiff will consent to the same justice being rendered to the defendant that he asks for himself. When the complainant in partition obtains a decree setting off to him his share, he secures all that he is entitled to and it need not concern him what disposition shall be made of the residue of the land among his co-tenants. That is their affair and not his. In like manner, each of the co-tenants is interested only as to his portion. There seems to be, then, no reason why cross-bills should be filed, or why there should be any service of process, excepting that which brings the defendants into court in the first instance."

Flexibility of Chancery Practice.

M'Claskey vs. Barr, 48 Fed. 136:

"In Coxe vs. Smith, 4 Johns. Ch., 271, Chancellor Kent, in a case for partition, said that an equitable title might be set up by the defendants by answer, and that a cross-bill was not necessary. He further said that, if that could not be done, the result would only be to let the cause stand over until the defendants, or such of them as asked for the recognition of their equitable title, could file a cross-bill. But he held that the cross-bill was not necessary.

In German vs. Machin, 6 Paige, 288, 290, Chancellor Walworth laid down the law as follows:

"The master was wrong in supposing that a defendant, in a partition suit in this court, could not set up in his answer as a defense to the suit, the fact that he was in equity entitled to the whole premises of which partition was sought by the bill. The defendant must unquestionably proceed by cross-bill, if, in addition to the denial of a decree for partition and a dismissal of the bill, he seeks further and affirmative relief on his part, by a decree for the transfer to him of the legal title to the whole premises, or if a discovery is necessary to establish his equitable defense;" citing Mitf. Eq. Pl. (3d Amer. Ed.) 81. See also:

Fife vs. Clayton, 13 Ves. 546.

Higginson vs. Clowes, 15 Ves. 525.

As to Jurisdiction Act of 1888.

It is doubtful if under the act of 1888 a defendant can be sued out of his district even if found in the outside district in any but actions of

the nature of actions in rem. The courts are animadverting upon the obscurity and inanity of this last jurisdictional act. It is in derogation of the Constitution of the U. S., and of us. It defies and impairs the Federal and the human constitution to digest it.

Wilson vs. W. U. Tel, Co., 34 Fed. 561.

Ex parte Shaw 12 Sup. Ct. Rep, 935 will be cited because it is a late attempt to interpret section 1 of this act of 1888. The court is very cautions, and hedges. See p. 938 last paragraph. "All that is now decided is that under the existing act of congress a corporation, incorporated in one State only, cannot be compelled to answer in a Circuit Court of the United States held in another State in which it has a usual place of business to a civil suit at law, or in equity, brought by a citizen of a different State."

The court forbids the stretching of this decision to cover any case brought in equity "to enforce any legal or equitable lien upon land, or to remove any incumbrance or lien or cloud upon title &c." by the fact that THIS WAS NO SUCH CASE.

The major premise of appellees' syllogism is true, but the minor false, and therefore their conclusion is false. The burden of their contention is that partition is an action in personam. If they could only convince this court of that, then they will claim section one of the new jurisdiction acts applies, and not section eightof the old.

The citations I have collated demonstrate that no matter what you call "actions in chancery to enforce any legal or equitable lien upon or claim to real estate," it shall be lawful to order an absent defendant to appear.

They evidently will not admit that there is, and that congress draws, a distinction between a capias or summons ad respondendum to bring a defendant from a distant district, probably a thousand miles, and a subpoena in chancery on a Bill concerning real property in the district where the suit is brought. In cases of the first-class the plaintiff must go to the district where the defendant is. In the last the defendant must come, or send to the district where the land is. As the mountain cannot go to Mahomet, he must come to the mountain. There are many good reasons for this. In all cases founded on contract or tort in which a capias may issue, the defendant may be required to come in and give bail, or appear at some stage in person, and he must prove his side by oral or mere documentary evidence. In cases in

chancery concerning real estate, no bail or personal presence is required, and the proof is generally if not universally dependant upon record evidence within the jurisdiction of the court where the land lies. The decree should be of record in the very county or district where the land is, for it becomes a muniment of title, and even while the action is pending every body dealing with owners, claimants, or lien holders is entitled to know whether any actions are pending affecting the title, and what they are.

The books are full of cases where defendants struggle to get out of Federal Courts. About half of the time of these courts would seem to be squandered upon jurisdictional questions. No wonder a few cases out of the vast multitude may be found squinting in favor of appellees' proposition. Look at the Railroad cases. For half a century astute counsel have labored in vain to keep railroads out of Federal Courts, chiefly on the ground that the stockholders, or the directors were citizens of the same State as some complainant, or of each other and had a controversy. To maintain their jurisdiction Federal Courts have time and time again held that a corporation may be a citizen, may sue in other States than that which created it, and also that other parties will not be permitted to show that stockholders, or even directors are citizens of either the same or other States, and give as the reason that to permit this would oust jurisdiction!

Whenever a case is thrown out of the Federal Courts for want of jurisdiction it is fully reported. Many, very many maintaining jurisdiction are not so reported—the point not mentioned. The court will notice that the same case, or one two cases, which happen to fit in the groove they have cut, are cited by opposing counsel from line to line page to page, brief to brief. Very quaint and doubtful cases they are too—dissented from, animadverted upon, and ignominously disregarded in numerous other cases. "Never satisfactory to the bar."

It does creep out, though, in their cases as well as those I cite that Federal Courts make partition; they make it when the complainant is not a resident of the district in which the land lies; when the defendants are not ALL residents of the State where the suit is brought; where the parties are not all unanimous in favor of every other party getting exactly what they claim or the courts give, and even where the right to partition at all, and the title of certain parties, is denied. They sometimes dismiss a complainant or defendant; they never refuse an amend-

ment when there is anything to amend by, or when the amendment will perfect the pleading or proceeding; they only require an affidavit for an amendment AFTER REPLICATION (Rule 29.) They express their abhorrence of a mutiplicity of suits and regard it as a greater evil than multifariousness; they always re-imburse the co-tenant who pays the taxes, and preserves the property, and they pay the expenses of the party who creates a fund out of the fund itself—including fees to complainant's solicitor in partition cases—they never refuse:

See citations already given.

Lowe vs. Phillips, 21 Ohio St. 657.

Luzerne Ass'n vs. Peoples' Bank, 21 Atlantic 806.

Greusel vs. Smith, 48 N. W. 616.

Simmons vs. Bayard, 30 Federal 532, (4th Syl.)

Appellees are driven by sheer desperation to deny that a co-tenant has any claim to, or lien upon the property sought to be partitioned. And yet they cannot help mentioning Greeley's title, Stewarts' interest, McRae's claim! To state this proposition is to refute it.

They cite careless remarks of loose text writers, gleaned from one or two loose and ill-considered decisions, that partition is not an action in rem, although the fact must forever remain that an action to divide up real estate among its owners is an action concerning a res, local in its nature; that if the thing itself cannot be divided equitably it must be sold; and that there is no personal judgment over against anybody except for costs, and even they generally come out of the property.

But now when all these objections are overcome and demolished they still have a terrible denunciation which will annihilate this case, and all of its kind: Section 8 of the "Act entitled an act to protect all citizens in their civil and legal rights" passed by Congress March 1st 1875, is UNCONSTITUTIONAL!

They say: "We look in vain in section 2, Act 3 of the Constitution of the United States, for any mention of the publication act. The framers of the Constitution forgot to put it in, or any other provision upon which jurisdiction in this case can possibly be based &c."

The publication act is not one of the granted powers! It is therefore forbidden!!

And now here as late as August 13th, 1888 Congress after enacting

Section 1 of the Jurisdiction Act (Stat. 1888 page 434) in which as counsel for appellees assert: "the entire jurisdiction given to courts is sought to be concentrated" reiterate that unconstitutional section of said Jurisdiction Act page 436 same law:

Sec. 5. That nothing in this act shall be held, deemed or construed to repeal or affect any jurisdiction or right mentioned in section 8 of the act approved March 1st, 1875, entitled "An Act to protect all citizens in their civil and legal rights."

Does this look as if jurisdiction is concentrated in section 1 Act of 1888 or that section 8 is unconstitutional?

This section 8 (738 R. S.) says: "When any defendant—is not an inhabitant of nor found within said district, and does not voluntarily appear, it shall be lawful for the court to make an order directing such absent defendant to appear &c."

Appellees' counsel say: "it can't be done. We have examined all the cases, and we are positive it cannot be done."

That ought to settle it, the Act of Congress and the decisions of every Federal Judge in the Union to the contrary notwithstanding—except one or two survivors of State Sovereignty!

"Yes, but most of these decisions are in cases where the defendants voluntarily appeared or did not object to the jurisdiction—and they may waive it."

What then do you say of the clause which says that if they "do not voluntarily appear" they can be ordered to appear, plead, answer or demur to complainants' bill?

Cases may be found, of course, where the citizenship is such that Federal Courts cannot take cognizance of them, although the subject matter is within the district. But a critical analysis of them shows that the reason is very strong. "A good judge amplifies his jurisdiction." If he refuses, others may refuse also to hear the case, and a wrong may go unredressed.

If the pleas against jurisdiction of Federal Courts as stated by my opponents and argued at great length, are good, nine-tenths of the cases heretofore maintained in these courts should have been dismissed, and the same proportion of those now pending should be thrown out.

The Supreme Court especially has been extremely technical—and therefore many cases are reported very fully and widely to deter litigants from rushing into Federal Courts. But the vast number of cases

decided upon their merits where there is no dismissal for want of jurisdiction, proves that the Federal Courts do hear the complaint of complainants against numerous defendants when the latter are citizens of different States from the former, although such defendants have interests antagonistic to each other, and are residents not only of many other States, but some of them of the same State as other defendants. Where there is evident merit, and good moral reason, the legal reason to entertain jurisdiction is generally found. The will makes the way. The case is "ancillary" or the parties are not "indispensable" or they are not in the proper sense "antagonistic" or "adverse," or the complainants' rights are vindicated and secured and the defendants are left to fight among themselves in State Courts if they insist on it.

Plea And Demurrer

Where both plea and demurrer are filed the plea should be postponed until the demurrer is disposed of.

Cambell vs. Meyer, 33 Fed., 795.

Upon argument a plea may be allowed, or the benefit reserved to the hearing, or it may be ordered to stand for an answer, or it may be overruled.

R. I. vs. Mass, 14 Pet. 210, 257–9.

If allowed, it must be because it is fully stated, all necessary averments—plaintiff may take issue upon it and have it tried as to its truth.

Mitfords Ch. Pl., Ch. 2 Section 2 pt. 2.

Plaintiff may amend with or without costs, Rule 35. If with costs, it is only defendant's.

The prayer to determine the legal title was amended so as simply to construe documents and determine which of the numerous grantees of Lowe and his heirs, should share with complainant. Greeley is entitled to partition as against Warner, although Warner may be opposed to partition. No one but Warner can set up that his title is joint with Greeley. If he does not claim anything for himself no one else has any right to claim anything for him. They are legal tenants in common, either entitled to partition whether the other wanted it or not. Just as the heirs of a deceased landholder or his devisees if he dies testate hold jointly as much as grantees by deed, and if there are debts must contribute to their payment before they can take in severalty. An accounting is often ordered between heirs and devisees. Grantees by deed

are no more joint tenants than devisees by will, or heirs, where more than one takes an interest in the same land. They are co-parceners unless the terms of the deed make them joint tenants.

Recapitulation.

After all then we are not far apart. Appellees' counsel adopt our cases, and they maintain the purposes of the Bill. They did not at first understand the full scope and meaning of section 738 of the Revised Statutes; nor are they correct as to legal titles being involved as between complainants and others in the sense that they must be tried at law, for there is nothing involved that a chancellor cannot and ought not to try without the aid of a jury. All the parties to the Bill claim from and under a common title—John T. and Susan Lowe. There is a construction of deeds asked, and also the adjustment of the legal and equitable rights of the parties, by one actually in possession.

I have argued this case largely in the language of the Statutes and the Judges of the Supreme Court of the United States, and of eminent Circuit Judges, more than one of whom have been promoted to the Supreme bench.

Appellees will depend mostly upon cases which are overruled, limited and criticised—at least they did so depend in the court below.

It is an open secret that the Supreme Court has hitherto been so overwhelmed with a multitude of cases that it has strained every statute to curtail its jurisdiction, against which the bar of the country has protested, not in vain, for these Circuit Courts of Appeals have been established, in the fond and eager hope that questions of jurisdiction may now be more liberally decided in favor of Federal Courts.

From these citations of cases which have never been overruled or limited, and reasonings from well established principles, and also from the practice of the Circuit Courts, well known to the bench, although the exact point may never have been reported though often decided, I respectfully submit that we may safely deduce the following:

CONCLUSIONS.

1. Federal Courts have jurisdiction for the partition of real estate.
2. The venue must be laid in the district where the land or part of it lies.
3. The action is of the nature of an action IN REM.

4. All parties who have an interest in or claim to the land, may be brought in; and if they are all citizens of different States from the complainants and value exceeds $2,000.00, federal jurisdiction may be taken.

5. If there are persons who have any interest held by any sort of trustees, and the presence of the beneficiaries would oust the jurisdiction, the trustees may represent them if the citizenship of such trustees is different from the complainants.

6. Where land is set off in severalty, wives of co-tenants are unnecessary parties, but where the pleadings show that land must be taken by by some co-tenants in owalty, or sold, such wives are necessary parties.

7. The administrator, as well as the heir, is a proper party in actions for partition in Florida. If land is set off it goes to the heir subject to the demand of the administrator; if the land is sold, proceeds go to the administrator until debts are paid.

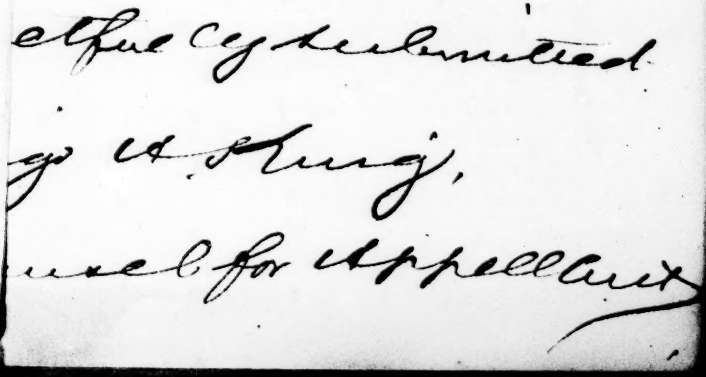
8. Complainants in possession of land are entitled to have it partioned as against all legal and equitable claimants. The titles and liens of all the parties may be adjusted and adjudicated, and the decree may include findings of allotment or distribution in favor of those who assert and prove their titles or liens, and against others whose rights are controverted and not established, and all the parties before the court will be bound by such decree.

The decree of the court below should be reversed and the Bill should be restored, and if jurisdiction can be entertained after amendments, they will be made.

Respectfully

JACKSONVILLE, FLORIDA.
September 1892.

JAMES R. CHALLEN,
Counsel for Appellants.



156-58.

GEORGE P. GREELEY, ET UX,
Appellants.

vs.

RICHARD H. LOWE, ET AL,
Appellees.

The Lowe Grant Case.

Appeal from United States Circuit Court, Northern District of Florida. In Chancery. For the Partition of Real Estate.

A. G. HAMLIN.
I. A. STEWART.
E. K. FOSTER.
E. BLY.
Counsel for Appellees.

Brief of Appellee's Counsel.

SUPREME COURT

--of the--

UNITED STATES.

GEORGE P. GREELEY, ET UX,
Appellants.

vs.

RICHARD H. LOWE, ET AL,
Appellees.

The Lowe Grant Case.

Appeal from United States Circuit Court, Northern District of Florida. In Chancery. For the Partition of Real Estate.

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UNITED STATES CIRCUIT COURT OF APPEALS.

FIFTH CIRCUIT. IN CHANCERY.

GEORGE P GREELEY AND WIFE VS. RICHARD H. LOWE, ET AL.	Appeal from Circuit Court United States, Northern District of Florida.

BRIEF OF CERTAIN APPELLANTS.

ANALYSIS OF BILL.

In order for a proper understanding of the questions presented for consideration by the numerous pleas and demurrers interposed by the several defendants, in the court below, and the determination of which resulted in the decree from which this appeal has been entered, a brief analysis of the bill may be found helpful.

(1). The bill is entitled, "For the Partition of Real Estate," but aside from its title there is little to impress it with this character. It seeks first the construction of a great number of deeds therein set forth, or which may be filed in the course of the proceedings, "that the interest, if any, conveyed may be ascertained, and where none is conveyed such deeds be so construed and cancelled." (Page 31 of record.)

The conveyances to be so construed and cancelled are not deeds only but land contracts of King & Bush (Page 17 of record), and the mortgage of Stewart. (Page 25 of record).

The real object of the bill is vividly set forth in the last part of Section 42 (page 27 of record), wherein the following language is used: "That no remedy at law exists to enable the complainant to obtain his share of said land in kind, or of proceeds if sold, and he is wholly without remedy except in chanc ery, for that unless all the shareholders of said land and all the lienholders thereon are discovered and marshaled, and the valid sustained and the invalid excluded, and the legal titles quieted as against the illegal, the said land will forever remain a forlorn wilderness."

It is thus sought in one action to determine who are the owners of the land, and then to partition the same. (Chapin v, Sears, 18.F. R. 814). This is sought to be done regardless of all adverse claims, regardless of all interests and conflicts.

(2). In the second place, the bill seeks to recover all money

expended by Greeley in this litigation, directly or indirectly, or in holding an alleged adverse possession, for taxes paid, for counsel fees, etc. (Pages 27 and 31 of record).

This is sought to be taken out of the proceeds of the sale of the land, upon final decree in partition, regardless of the fact that some of the adverse owners may succeed in establishing their titles to all or portions of the property. They are thus to be compelled to pay Greeley for attacking their titles, trying to hold the property against them, and for counsel fees in that behalf. If this can be done, Greeley can well afford to litigate, as he has no chances to run whoever may win, and he can thus afford to buy for a song claims that he knows are doubtful, as he has done in this case.

(3). It is shown, in the third place, that a sale of the property will be necessary. Reasons are alleged why the land cannot be partitioned after the title is litigated, but must be sold by commissioners under the decree of the court (Page 27 of record).

In order that such sale may be decreed, it is necessary that all parties interested in the property be joined in the proceedings. To decree such a sale while the title is in any manner in dispute, would be decreeing clouds upon the title, rather than clearing them up.

The object of the bill being for a sale of the land, rather than for partition, such a bill must be distinguished in principle from one in which one or more parties seek the mere partition and setting off of their particular interests, in such manner that none of the parties interested can be injured or in the least affected. In the one case the object of the bill is simply to stake off the interest of the complainants; in the other it is to affect every foot of land so that a purchaser at the sale decreed shall obtain a perfect title to the whole. In the former case the controversy might be separate, and all adverse claimants or parties interested might not be indispensable parties; but in the case at bar every party claiming any interest is a material and necessary party. The litigation cannot go on without affecting each and all. If dismissed as to one, it must be as to all. Under such circumstances, relief cannot be granted to any. (Barney v. Baltimore City, 6 Wall. 280).

The title of the Bryans and those claiming under them, of the McRaes and those claiming under them, and of the Clinches and those claiming under them, are adverse to all cotenants in the bill. More adverse titles could not be conceived to exist. The Bryans claim under an alleged deed from Reed, administrator of John T. Lowe, bearing date subsequent to the death of

both Lowe and his wife. It conveys the whole property. (Page 16 of record). If irregular in form or execution, it is yet sufficient upon which to base adverse possession, as all that is required for that, under Florida Statutes, is a paper writing. If this title be good, the Lowe heirs have no interest, and the title of Greeley and Warner is from such heirs. The Bryans and those under them are therefore adverse to the partition.

The McRaes are equally adverse to the Lowe heirs, and the partition sought by them. They claim under two deeds—one from Susanna Lowe, widow of John T. Lowe, executed after his death and previous to the Bryan title, conveying an undivided one-seventh in the whole property (page 14 of record); the other from Ellen Miller, a daughter of John T. and Susanna Lowe, executed after the death of her parents, conveying another undivided one-seventh. (Page 14 of record). The Lowe heirs, and Greeley and Warner, who purchased the interest of many of them, claim the McRae deeds are not properly executed and are otherwise insufficient to convey title. The McRae titles are therefore adverse to the heirs of Lowe, and to the partition sought. They antedate any interest of those now seeking partition, for if these deeds are good, the present Lowe heirs never possessed the interests they have attempted to convey to Greeley and Warner. The McRae title is none the less adverse by reason of having originated in the ancestors of the Lowe heirs. That the title to the whole property was once common in Lowe and wife, can make no difference. Every title can be traced to a common source. The diversity of interest has arisen since the death of Lowe.

The title of the Clinches is also adverse, as they claim the entire south half of the property by deed from Lowe in his lifetime. The bill admits the validity of the deed, but denies that it conveyed the entire south half, as the wife of Lowe did not join in the deed. (Page 4 of record). The controversy between the Lowe heirs and those claiming under the Clinches is, whether the interest of Mrs. Lowe in the property was one-half under the Spanish law, or merely a dower interest, which died with her and left the Clinch title perfect.

The Clinches are alleged to be cotenants, while they are seen to have no interest in the north half of the property, and the Lowe heirs have none in the south half as against the Clinch title to an absolute portion of the property, rather than an undivided portion. We urge, in passing, that this admission of the validity of the Clinch title to the south half of the property, so far as Lowe was concerned, was fatal to partition. Whenever it appears that any of the cotenants are not interested in every

part of the land sought to be partitioned, the bill must be dismissed, since a decree of partition would be absolutely void. (5 Wait's Actions and Defenses, p. 94, and cases cited).

(4). The bill shows a controversy between citizens of Georgia. J. H. M. Clinch, as executor of Duncan L. Clinch, and several of the heirs of said Duncan L. Clinch, are citizens of Georgia, as is also Joseph Rosenheim, trustee. (Page 2 of record).

The Clinches claim the entire south half of the Grant under deed from Lowe in his lifetime. Rosenheim claims some 1700 acres under the Bryan title. (Pages 20 and 21 of the record). The Bryan title is from the administrator of Lowe, and purports to convey the entire Grant. There is certainly a controversy between these parties.

(5). The bill and amendments show a controversy between citizens of New York. Samuel C. Warner (page 41 of record), Mary G. and Frederick B. Van Voorst (page 2 of record), and David B. Parce are citizens of New York. Parce filed plea as to his citizenship (page 63 of record), and in setting the plea for hearing the allegation stands admitted.

Warner claims under the Lowe heirs (pages 8, 9, 10 and 11 of record), Parce under the Bryan title (page 26 of record), and the Van Voorsts under the McRae title (page 15 of record). Each interest is opposed to the others. If the Bryan title is valid neither Warner nor the Van Voorsts have anything. If Warner's title is good, it defeats Parce and the Van Voorsts while the latter are not only opposed to each other but both are opposed to partition.

(6). The bill shows a controversy between citizens of Florida. S. J. Hodges, and thirty-eight other defendants claiming under the Bryan title; Philip E. Lowe, and twelve other Lowe heirs and those claiming under them; Walter A. Drake, claiming under the McRae title; and King & Bush claiming under contracts from certain Lowe heirs—are citizens of Florida. (Page 1 of record). These various interests are opposed to each other. The Bryan claim is for the whole Grant, the McRae, two-sevenths in all, the Lowe heirs an undivided interest in all, and King & Bush claim by contract title an interest conveyed to them by certain of the Lowe heirs. The Bryans deny the title of all. The Lowe heirs deny the title of all except a portion of that of the Clinches. The McRaes deny the title of all in their two-sevenths. King & Bush deny the interest of all in their interest in the whole Grant. Greeley and Warner and the Lowe heirs want partition and sale. The Bryans want no

partition or sale. Claimants under them hold titles by metes and bounds, and want only the particular property described in their deeds. The forced sale of the entire property would bring nothing for their interests, even if their titles are held good.

Thus we see a multitude of conflicting interests. If the litigation goes on, each class will put in answers or pleas which may affect other defendants more than they do complainant, yet defendants cannot demur or join issue properly. Evidence will be produced to sustain each demurrer or plea, yet other defendants cannot object to it, contradict it, argue it, or appeal from any decision based thereon, as defendants only possess these privileges as against complainants. This is why the courts say such controversies cannot be determined in one suit either in law or equity. (Mattair v. Payne, 15 Fla. 682.)

The case resembles a drunken mob or free fight, in which every man's head is liable to be broken by his best friend, with no way to get out of the crowd or safely defend himself.

This bill is so framed and of such a nature that all parties are necessary. Even if it were possible to dismiss as to non-residents who cannot legally be brought in, there would still exist one or more controversies between citizens of Florida. We shall show that United States courts only have jurisdiction in controversies wholly between citizens of different States, and that in determining this every plaintiff must be capable of sueing and every defendant liable to be sued in the Northern District of Florida.

Other difficulties appear in the bill, which we will not discuss as they are apparent upon inspection. We believe enough has been shown to convince the court that our facts are unanswerable.

Numerous pleas and demurrers were interposed by defendants in the court below, all of which were set down for hearing and argument by complainant. (Page 74 of record.)

While argument was in progress, complainant moved to amend the bill (page 41 of record), which was opposed by defendants, and met by a counter motion to dismiss the bill. (Page 42 of record.)

Motion to amend was allowed, and bill then dismissed by the court.

Application for rehearing was made and granted. Counsel for defendants were not present at the rehearing, and without notice to defendants other amendments to bill were then made, "in order that the court may without doubt retain jurisdiction." (Page 46 of record.)

We shall refer to these amendments again, and therefore will not discuss them at this place, but proceed to the discussion of the law controlling this case.

I

Jurisdiction---Citizenship.

The court did not err in dismissing the bill for want of jurisdiction. The Federal Constitution allows to United States courts certain maximum jurisdiction, to be granted by Congress from time to time. Jurisdiction of the bill at bar can only be maintained under that clause of the Constitution which authorizes jurisdiction in suits between citizens of different States. The primary prerequisite in this case is that there shall be a controversy between citizens of different States.

Constitution of U. S., Art. 3, Sec. 2.

Congress has delegated to United States Circuit Courts jurisdiction between "Citizens of different States," using the very language of the Constitution, with the limitation that in cases in which jurisdiction is dependent upon difference in citizenship, suit shall be brought only in the district of the residence of plaintiff or defendant.

Act of Congress Aug. 13, 1888, Sec. 1; 25 Stat. 433.

The entire scope of jurisdiction of these courts is laid down in Section 1. of that Act, and is not found elsewhere.

Smith v. Lyon, 133 U. S. 315; 33 L. Ed. 635.
Jewett v. Savings Bank, 45 F. R. 801.

A controversy between citizens of different States, when there are several plaintiffs or defendants, has been uniformily held "for more than ninety years" to be one in which each plaintiff is competent to sue, and each defendant liable to be sued at the place where suit is brought. There is no difference in this respect between cases at law and equity.

Smith v. Lyon, 133 U. S. 315; 33 L. Ed. 635.
Anderson v. Watt, 138 U. S. 694; 34 L. Ed. 1078.
R. R. Co. v. Blatchford, 11 Wall. 172; 20 L. Ed. 179.
Karns v. R. R. Co. 10 F. R. 309.

Every party on one side must be a citizen of a different State from every party on the other.

Blake v. McKinn, 103 U. S. 336; 26 L. Ed. 563.

In determining between whom the controversy exists the court is not bound by the title of the cause or the form of the pleadings, but should examine the record, ascertain the matter in dispute and arrange the parties on opposite sides according to the facts, no matter what their technical places as plaintiffs or defendants may be. This is true of all classes of cases at law or equity.

Foster's Fed. Prac. Sec. 18.
Pacific R. R. Co. v. Ketchum, 101 U. S. 289; 25 L. Ed. 932.
Blake v. McKinn, 103 U. S. 336; 26 L. Ed. 563.
Peninsular Iron Co. v. Stone, 121 U. S. 631; 30 L. Ed. 1020.
Bland v. Freeman, 29 F. R. 669.
Karns v. R. R. Co. 10 F. R. 309, and numerous cases cited in these authorities.

Ranging parties regardless of their technical place as plaintiffs or defendants, is applicable to partition suits in chancery.

Beebee v. R. R. Co. 39 F. R. 481.
Covert v. Waldron, 33 F. R. 311.
Rich v. Bray, 37 F. R. 273.

This rule is applicable to original suits, as well as to those removed from State Courts.

Karns v. R. R. Co. 10 F. R. 309.
R. R. Co. v. Ketchum, 101 U. S. 289; 25 L. Ed. 932.
Peninsular Iron Co. v. Stone, 121 U. S. 632; 30 L. Ed. 1020.
Removal Cases, 100 U. S. 457.

United States Circuit Courts have no original jurisdiction in suits between citizens of one State, and citizens of the same and of another State, either in law or equity. The statute of 1887 "makes no provision for the case of two defendants or two plaintiffs who are citizens of different States."

Karns v. R. R. Co. 10 F. R. 309.
Smith v. Lyon, 133 U. S. 315; 33 L. Ed. 635.

In a partition or other suit if it appears that many of the defendants are from the same State, with conflicting interests, the controversy is between citizens of the same State and cannot be sustained.

Covert v. Waldron, 33 F. R. 311.

United States courts will not allow their jurisdiction to be imposed upon by being improperly invoked, or allow parties by

subterfuge or collusion to successfully thrust jurisdiction upon such courts. They will investigate such matters of their own motion, as it has been the constant effort of Congress and of United States courts to prevent litigation between citizens of the same State in United States courts.

Anderson v. Watt, 138 U. S. 694; 34 L. Ed. 1078.
Rich v. Bray, 37 F. R. 279.
Boors v. Preston, 111 U. S. 255; 28 L. Ed. 419.
Bland v. Freeman, 29 F. R. 669.

If defendant Warner, a citizen of New York, had been joined in the suit at bar, as complainant, with his joint tenant Greeley, there would clearly have been a controversy between said Warner and Parce and the Van Voorsts, all of whom are citizens of New York and have antagonistic interests. (See plea of Parce, page 63 of record). Partition is sought for Warner, no wrong is alleged against him, and the Solicitor for appellant is his Solicitor. Does not Rich v. Bray describe his case?

II

Jurisdiction---Residence.

The bill was properly dismissed because jurisdiction depending only upon difference in citizenship, the suit was not brought in the district of the residence of plaintiff or defendant.

On this point the Statute reads as follows:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Act Aug. 13, 1888, Sec. 1; 25 Stat. L. 433.

This must be considered a limitation upon that other clause of the same section granting generally to Circuit courts jurisdiction in controversies between citizens of different States. The very language shows this, "And when jurisdiction depends, &c." Congress was empowered by Sec. 2, Art. 3, of the Federal Constitution to grant jurisdiction without this limitation, in controversies between citizens of different States, but this

has never been done. It has been the constant effort of Congress and the courts to limit jurisdiction. It is narrower under the Act of 1887 than heretofore.

McCormick Harv. Mch. Co. v. Walthers, 134 U. S. 41; 33 L. Ed. 833.

Anderson v. Watt, 138 U. S. 694; 34 L. Ed. 1078.

Smith v. Lyon, 133 U. S. 315; 33 L. Ed. 635.

Bensinger Cash Reg. Co. v. Nat'l Cash Reg. Co. 72 F. R. 81.

That the last named decision, in its construction of Sec. 1. did not intend to limit it to cases at common law, or to any particular class of chancery cases, is evident from the cases cited therein. Most of them are chancery cases, and some are cases to enforce liens upon real or personal property within the district. As to the latter see

R. R. & Coal Co. v. Blatchford, 78 U. S. 172; 20 L. Ed. 179.

Peninsular Iron Co. v. Stone, 121 U. S. 631; 30 L. Ed. 1020.

New Orleans v. Winter, 14 U. S. 91; 4 L. Ed. 44.

In Smith v. Lyon the court points out that the first clause of Sec. 1. describes the jurisdiction common to all Circuit courts of the United States as regards the subject matter of the suit, and as regards the character of the parties who may maintain suits therein. The court then says: "But the next sentence in the same section undertakes to define the jurisdiction of each one of the several Circuit courts of the United States with reference to its territorial limits." The clause under discussion is then quoted in full, and the court lays down the broad and unqualified principle, with reference to residents without the districts, that each plaintiff must be competent to sue, and each defendant liable to be sued, therein. Whether a controversy is between citizens of different States, and whether a party can sue or is liable to be sued in a certain district, are separate and district questions and arise on separate clauses of the Judiciary Act.

The decision on this point in Smith v. Lyon is followed and approved in McCormick Harv. Mch. Co. v. Walthers.

In Anderson v. Watt substantially the same language is used, and it is then shown how Congress and the courts have constantly striven to limit the jurisdiction of Federal courts. This is the last opinion in which Sec. 1. is construed, and the court says: "Since the Act of 1875, if it appears from the pleadings and proofs taken together that the defendants are citizens

of the United States and reside, in the sense of having their permanent domicile, in the State of which the complainants are citizens, or that each of the indispensable adverse parties are not competent to sue or liable to be sued therein, the Circuit court cannot maintain cognizance of the suit." This construction of the Act is conclusive of our entire position, both as to citizenship and as to defendants residing within and without the district. That suit was dismissed, and the case at bar was properly dismissed for like reasons. We shall treat this point more at length later on, but would call it to the attention of the court, in passing, that Anderson v. Watt was a suit in chancery to enforce an equitable lien upon real property.

Appellant's Position.

But it is contended by appellant that jurisdiction is given by Section 8 of the Act of March 3, 1875, known as "The Publication Act," and the frantic persistence with which this view is urged upon the court savors of that desperation which catches at a straw. This is probably the first time in which it was ever claimed that the publication Act bestowed jurisdiction where the court would otherwise not possess it. In conferring jurisdiction upon United States courts, Section 2, Article 3, of the Constitution makes no mention of the publication Act, and contains no language upon which jurisdiction in this case can possibly be based, except the words, "controversies between citizens of different States." The proposition that the jurisdiction of United States courts is bounded by the provisions of this Section of the Constitution, needs no argument. Congress has never given to these courts the full jurisdiction allowed. The full measure of jurisdiction is given, except that there is not under the Act of 1887 full jurisdiction between citizens of different States, the limitation being that "no person shall be arrested * * * * ; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either plaintiff or defendant."

The Statute providing for publication does not enlarge the jurisdiction of United States courts, but only provides a method of bringing parties before the court in a certain class of cases wherein there is jurisdiction otherwise.

Brigham v. Luddington, 12 Blatch. 237.
Pacific R. R. v. Mo. Pacific R. R. 3 F. R. 772.
Jewett v. Savings Bank, 45 F. R. 801.
Van Antwerp v. Hulburd, 7 Blatch. 432.
Detweiler v. Holderbaum, 42 F. R. 337.
Remer v. Mackay, 35 F. R. 86.

In Brigham v. Luddington the court was asked for an order of publication, and in refusing it the court laid it down as a rule that the publication Act was only intended to apply to cases wherein the court otherwise had jurisdiction.

In Pacific R. R. Co. v. Mo. Pacific R. R. Co. it was held by Justice Miller, not only that the publication Act does not confer jurisdiction, but that it does not authorize service on non-residents except within the same State in cases where such State is divided into two or more districts.

In Jewett v. Savings Bank it is held that a non-resident defendant may successfully object to being brought in even in case of a lien, but that this exemption is a privilege that can be waived.

In Remer v. Mackay it is held that jurisdiction is so much dependent upon requisite citizenship, that a suit to remove a cloud from title can be maintained in Illinois, where the court has jurisdiction of the parties, rather than in Iowa, where the land is situated?

United States courts have no jurisdiction except such as the Statutes clearly confer. There is no such thing as a presumption of jurisdiction. The presumption is always against it, and if there is any doubt as to jurisdiction it is the uniform rule to refuse to entertain jurisdiction.

Sewing Mach. cases, 18 Wall. 553; 21 L. Ed. 914.
Anderson v. Watt, 139 U. S. 449.
Boors v. Preston, 111 U. S. 255; 28 L. Ed. 419.
Mennard v. Coggan, 121 U. S. 253.
Robertson v. Case, 97 U. S. 646; 24 L. Ed. 1057.
Brown v. Keene, 8 Pet. 112.

The entire jurisdiction given to the courts is sought to be concentrated in Section 1. of the Act of 1887. This is the general jurisdictional clause, and none other is intended. The wording of the Act is significant. Jurisdiction is granted in Section 1. with the limitation that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought in the district of the residence of either plaintiff or defendant." Then comes Section 8 and says that the Act shall be so construed as to keep in force the publication Act. This does not mean that the publication

Act shall be paramount, and that citizenship and district within which a party is entitled to be sued shall be disregarded.

If the Section which keeps the publication Act in force was intended to controverse any of the provisions of Section 1. it would have been mentioned therein as a limitation, just as is the limitation to the clause providing, for controversies between citizens of different States, viz: the provision as to where parties shall be sued.

If the publication clause is a jurisdictional clause, it is broad enough to go beyond anything permitted by the Constitution, as it is without limit as to difference of citizenship, or as to districts. Anyone could sue any other person anywhere in the whole world in a Circuit court, regardless of citizenship or any other constitutional limitations, in a certain class of cases therein named. It is plain to be seen that such a construction would array the publicatcn clause in conflict with all the limitations contained in Section 1. and we would have an Act inconsistent with itself and impossible to be construed, and the absurdity alluded to in the Brigham v. Luddington.

Bensinger Cash Reg. Co. v. Nat'l Cash Reg. Co. 42 F. R 81.

If, however, this clause is construed to give a right to proceed by publication only in cases in which the court otherwise has jurisdiction, as we contend it should be, there is no conflict. In the words of Brigham v. Luddington, "Nothing in the Act of 1872"(the original publication Act), "warrants the suggestion that Congress intended anything more than to furnish a means of obtaining jurisdiction of the person of a defendant not found within the district in actions whereof the court, under the Constitution and existing Statutes, would have jurisdiction if all the defendants were personally served with process within the district, or voluntarily appeared."

The construction that we contend for has been followed in Brigham v. Luddington and Detweiler v. Holderbaum, and in many other cases heretofore cited by us under appropriate heads. These two cases are particularly referred to, because in the former it is clearly pointed out that the publication Act was not intended to confer jurisdiction, but to provide a means of service in cases in which jurisdiction has already attacked. The latter case is authority to the same effect, and holds generally that under the facts in that case the absent defendants could not be brought in without ousting jurisdiction, and the case should be dismissed without prejudice to complainant's right to proceed in the State court of Iowa.

The Act of 1887 has been construed in many cases in which the publication Act is not particularly mentioned, but if the construction of the general jurisdiction of courts therein be sound, this construction cannot be changed by the publication Act.

Anderson v. Watt, 138 U. S. 694; 34 L. Ed. 1078.
Smith v. Lyon, 133 U. S. 315; 33 L. Ed. 673.

The case of Anderson v. Watt is the last expression of the Supreme court upon the question at issue. The publication Act is not mentioned, but it will be noticed that the suit is one to enforce an equitable lien upon real estate in the district, and the court unanimously holds that, since the Act of 1875, if the defendants reside in the State of which the complainants are citizens, or if each of the indispensable adverse parties is not competent to be sued therein, the Circuit court cannot retain cognizance of the suit. The difficulty was a jurisdictional one—the controversy was not one between citizens of different States. If it were possible to bring the parties in by publication, the Supreme court would surely have said so.

In Brigham v. Luddington, cited above, an order of publication *was asked for* by counsel, on the theory, probably, that this broadened the jurisdiction. The court says: "But herein a difficulty occurs which is fatal to any proceeding hereafter in continuance of this suit. If the railroad company be brought in as defendant, it will defeat the jurisdiction of the court over the suit itself. * * * * * I know of no mode in which this difficulty can be overcome. The question would then be one of jurisdiction, not of parties but of the action. The Act of 1872 does not prevent this result. It authorizes, in certain cases, the bringing in of parties defendant not found within the district. It prescribes a substitute for service of process, but neither enlarges or affects the jurisdiction of the court over the action itself. If the court would not have such jurisdiction had the defendant been found and served within the district, it cannot acquire such jurisdiction by order published as directed in that Act. To adopt the opposite construction would lead to the absurdity, that, when the defendant voluntarily appeared, or was personally served within the district, the court would have no jurisdiction of the action; but when, by the mere accident of absence from the district, the defendant could be served by order and publication, jurisdiction would be obtained." The provisions regarding publication in the Act of 1872 are substantially the same as those now in force. The case of Anderson v. Watt is therefore just as conclusive as if the publication Act had been discussed

therein, because if the law therein laid down be correct, the publication Act could not have any weight for or against the position these taken. The language of the court applies as well to the question of jurisdiction between citizens of different States as to the place of bringing suit.

Publication would have been resorted to in that case if that would have given the court jurisdiction, and it is absurd to contend that jurisdiction was ousted because the absent defendant was not brought in by publication.

The case at bar is of precisely that nature. No attempt is made to show that we are incorrect in contending that the parties should be arranged on the various sides of the controversy on which they properly belong, and when this arrangement is made there is found the same difficulty that was encountered in Anderson v. Watt—a controversy between citizens of New York, and also between citizens of Florida. It is sought to avoid this difficulty by bringing the parties in by publication. This, as shown, is not only an absurdity, but would permit the Constitution to be over-reached, and there would be no limit to the cases which could be brought under the publication Act.

Smith v. Lyon, cited above, is no less comprehensive in its language. Whether it be a case in law or equity, the court would not so far forget itself as to lay down general propositions without limitation, if any limitation exists. The language of the court is almost precisely the same as that used in Anderson v. Watt, the latter being beyond dispute, a case on the equity side of the court, and to enforce an equitable lien against real estate in the district, thus bringing it exactly within the provisions of the publication Act.

That there is no distinction in this respect between cases at law and in equity, is sustained by the fact that all the cases cited in Smith v. Lyon, with one exception, are cases in equity. Some of them are for the enforcement of equitable liens against property within the district. Many of them use the very same language as Smith v. Lyon. If any distinction in this respect exists between cases at law and cases in equity, it is strange that cases at law should cite cases in equity and vice versa. These cases and their citations show that it has been the uniform construction that the publication Act confers upon the United States courts no additional or other jurisdiction than these courts have if the controversies involved are found to be wholly between citizens of different States, and brought in the district of the residence of either plaintiff or defendant.

of law, however, that when jurisdiction has been obtained it cannot be ousted, in certain cases, by subsequently bringing in other parties. This seems to be one of those cases, as appears upon page 246 of the opinion. It is not opposed to our position that the case must be dismissed when it appears at the beginning that the controversy is between citizens of the same State.

In the case under discussion jurisdiction was maintained, (1). Because it was not an original suit, but was auxiliary and dependent upon a former suit in another State, supplementary merely to the original suit out of which it had arisen, and could be maintained without reference to the citizenship or residence of the parties. (2). Because the parties who would have ousted the jurisdiction were not original parties, but came in after the court had obtained jurisdiction of the parties and the subject matter.

The question of citizenship is constitutional as well as statutory, while the right to be sued in a particular district is only statutory. No case has been cited which controverts our position on the question of citizenship, and none can be found. This is conclusive, and upon this point alone the court could do nothing but dismiss the bill.

There is a slight confusion of authorities upon the right of defendants to be sued within a particular district, but the weight is decidedly in our favor. While McBee v. Railway Co. seems to hold that publication could be made in that particular case, it so holds upon authorities which support the proposition that auxiliary and dependent suits may be maintained regardless of the question of citizenship. (See cases cited on page 246 of the opinion). We maintain therefore that the court did not intend to lay it down as a general proposition that in an *original* suit the place of residence of the parties, or the place in which the suit can be brought can any more be disregarded than the question of citizenship.

Fisk v. Hernarie, 32 F. R. 417, is also cited by appellant. This case is simply a laborious argument on the removal of cases. The argument is that in cases of removal the rule with regard to citizenship is different than that which exists in original proceedings brought in the first instance in the Federal court. The case at bar is an original suit and not before the court on removal, and Fisk v. Hernarie has therefore no application.

Goodman v. Niblack, 102 U. S. 556; 26 L. Ed. 229, is cited by appellant in support of the proposition that parties might be

brought in by publication. It is evident the court did not mean to hold that defendants could be so brought in if there was not the requisite citizenship, because on that point, on the last page of the opinion, the court speaks as follows: "This is a proceeding in equity to enforce a lien on the fund which is within the reach of the court, *and as the trustees and complainant have the requisite citizenship*. Section 738 of the Revised Statutes provides a remedy for inability to serve process by an order of publication." "Requisite citizenship" was therefore necessary, in the mind of the court, before the publication Act was applicable. Our position is that the publication Act must be construed to mean that publication may bring parties in from without the district whenever suit is brought in the district of the residence of either plaintiff or defendant, and not otherwise. The suit at bar is not brought in the district of the residence of either plaintiff or defendant, in contemplation of law. Greeley is a citizen of New Hampshire, and of the defendants many are not citizens within the district. The non-resident defendants, are not "liable to be sued" within the district, and we have seen that each defendant must be liable to be sued within the district. Goodman v. Niblack is not opposed to this position. The citizenship or residence of the parties does not appear, but when the court says that the parties have the requisite citizenship to render the publication law applicable, we understand that there was a controversy between citizens of different States, and that the suit was brought in the residence of either plaintiff or defendant. This view is supported by the case of Pacific R. R. v. Mo. Pacific R'y Co. 3 F. R. 772. This case was decided by Justice Miller, as was also the case of Goodman v. Niblack. Each was decided in the same year (1880). In the former case the court says: "There is nothing in any Statute of the United States that gives to the process of the Circuit court of the United States, in a civil case, any power to bring a party within the jurisdiction of the court when he is not in and cannot be served within the limits of the territory." It was urged upon the court that this was a proceeding to enforce a lien, and hence that it was within the provisions of the publication Act, and the court in speaking of this Act, says: "This Section does not authorize the issuance of the process, either of summons or subpœna in chancery, to be served beyond the limits of the jurisdiction of the court."

Such being the mind of the court, we do not think the same court could have intended, in Goodman v. Niblack, to hold the contrary view at about the same time, especially as the residence and citizenship of parties can only be surmised in last mentioned case.

The case of Ames v. Holderbaum, 42 F. R. 341 is also cited by appellant. This decision is a splendid argument in support of our position that the publication Act does not bestow jurisdiction, but simply determines the place of bringing suit if the property is within the district, *where the controversy is between citizens of different States.* Upon the proposition that if the controversy is between citizens of different States, parties may be brought in by publication, regardless of the residence of either plaintiffs or defendants, it is opposed to our position. It seems to hold that if the suit is brought to enforce a lien upon realty in the district, the publication Act is applicable, regardless of the district in which the suit is brought, provided there is requisite difference of citizenship.

This case and Wheelwright v. St. Louis, N. O. & O. Canal & Transp. Co. 50 F. R. 709, are the only cases cited by appellant that are opposed to us on this point. The latter case is very brief, and cites no authorities in support of its position. The necessity of a difference of citizenship is recognized by the court. "Possible jurisdiction is given," the court says, "under the constitution of the United States, since the parties are citizens of different States." We think these decisions are opposed to Smith v. Lyon and Anderson v. Watt, but even if they correctly expound the law, the bill at bar was properly dismissed because there is not the necessary difference in citizenship, and because it is not brought to enforce a claim or lien upon property within the district.

Ober v. Gallagher, 93 U. S. 199, was cited by appellant, in the court below, as overruling Strawbridge v. Curtis, 3 Cranch, 267, on which it was claimed that Smith v. Lyon is based. It is not true that Strawbridge v. Curtis is overruled by this case, nor does the decision so hold. It holds, on page 205, that the Act of 1839 was passed to rid the courts of the decision in the Strawbridge case—that is, "rid" them of its effects by enlarging the Statute. The Act of 1839, referted to, *is not the publication Act* (which was not passed until 1872) and was not intended to give jurisdiction except between citizens of different States. (Shields v. Barrow, 58 U. S. 129).

The case under discussion simply holds that bringing in absent defendant does not oust jurisdiction, "unless such absent defendant is an indispensable party." (See Gould's notes on Rev. Stat. p. 209). On page 204 the court says: "If, however, an indispensable party was a citizen of the same State with the plaintiff the jurisdiction would be defeated; because the controversy would nof be between citizens of different States, and thus not within the judicial power of the United States as defined by the

constitution. The decisions to this effect are numerous." This is exactly our contention. In the case at bar the question arises over material or indispensable parties, as we shall argue later on. (Freeman on Cotenancy and Partition, Sec. 463).

Neither the Act of 1839 or Rule 47 was intended to make it unnecessary to join all material parties.

Shield v. Barrow, 58 U. S. 129.
Barney v. Baltimore City, 6 Wall, 285.

As held in Smith v. Lyon, the principle we contend for, and which was first laid down in Strawbridge v. Curtis, has been the law for over ninety years and has been "construed in a uniform manner for that time."

Appellant cites Gould and Tucker's Notes, 209–10, in support of the proposition that in suits to subject property within the district, a non-resident defendant whether sole defendant or one of several, may be brought into court by service anywhere, or by publication. Had he read carefully the cases therein cited, he certainly would have discovered that they universally hold and establish the rule: (1). That the defendants brought in or dropped must not be indispensable parties. (2). That in no case is it held that jurisdiction was given between citizens of the same State, or that suit could be brought in a district in which neither plaintiff or defendant reside. We invite the court to a careful perusal of page 209 of Gould's Notes, and the cases there cited, and suggest that almost any proposition can be supported by almost any authority, if disjoined sentences be selected, rather than the whole text.

Original and "Substituted" Process.

Some stress is placed by appellant upon the words "original process or proceeding" in the first section of the Act of March 3, 1875, and it is argued that this does not forbid "substituted" process. Process is defined as, "The mandate of the court to its officer commanding him to perform certain services within his official cognizance."(19 Am.& Eng. Ency. of Law, 222). What is a "substituted" mandate? Goodman v. Niblack and several other cases cited by appellant speak of the order of publication as a "method of service." We do not think that Congress, in using the words quoted by appellant, intended to establish any new division of process, but rather had in view the division into original, mesne and final, which has existed from time immemorial.

Long prior to the publication Act, a large class of cases

was recognized by the courts in which suits could be maintained without reference to the residence of the parties. Some of these are referred to in Freeman v. Howe, 65 U. S. 450; 16 L. Ed. at page 752. They are not original proceedings, but are supplementary to a proceeding of which the court already has jurisdiction. Had Congress simply said, "No civil suit shall be brought before either of said courts against any person in any other district than that whereof he is an inhabitant," the result would have been the annullment of these decisions, and the establishment of a new rule regarding these cases. In order therefore to preserve the law unchanged as to these cases, Congress inserts, as a saving clause, the language upon which so much stress is placed by appellant. We submit that this is the proper construction of this language.

It was argued by complainant in the lower court that the Florida Statute on partition (McClel. Dig. p. 801) and Chapter 3884, Acts of 1889, of Florida, in some way enlarged the jurisdiction of United States courts. This is so absurd that it will probably not be seriously urged here, and we will only cite a few authorities holding that State statutes cannot enlarge the jurisdiction of United States courts.

Rich v. Bray, 37 F. R. 273.
Beebe v. R. R. Co., 39 F. R. 481.
Holland v. Challen, 110 U. S. 15; 28 L. Ed. 52.
Parker v. Ormsby, 141 U. S. 81; 35 L. Ed. 654.

The Florida partition Act was passed in 1844, Chapter 3884 was passed in 1889. They do not cover the same subject. One provides for the partition of lands and the other for removing clouds from title, "in certain cases."

It is a general rule that a special act is not repealed or affected by a subsequent act, general in its terms, which does not in express terms repeal or change the special. Neither are they construed "in pari materia."

Ex parte Crow Dog, 109 U. S. 556; 27 L. Ed. 1030.
State v. Stall, 17 Wall. 425; 21 L. Ed. 650.
Moonis v. Arthur, 95 U. S. 144; 24 L. Ed. 420.
Cass Co. v. Gillett, 100 U. S. 585; 25 L. Ed. 585.
Jones v. Dexter Admer, 8 Fla. 276.
Luke v. State of Fla., 5 Fla. 185.
McCarthy v. Havis & Perry, 23, Fla. 508.
State ex rel Gonzales v. Palmes, 23 Fla. 620.
Mitchell v. Duncan, 7 Fla. 13.

We urge upon the court that the construction of the publication Act for which we contend renders the Acts conferring jurisdiction upon United States courts a harmonious and consistent system; while the construction contented for by appellant is inconsistent with the other Acts and in conflict with the constitution.

No provision of a statute can enlarge the constitutional jurisdiction. The constitution and all statutes under it must be construed together as one law.

R. R. Co. v. R. R. Co., 115 U. S. 326; 29 L. Ed. 414.
Presser v. Illinois, 116 U. S. 252; 29 L. Ed. 615.
Grenade Co. v. Brown, 112 U. S. 26; 28 L. Ed. 704.

The statute providing for publication is without limit upon its face, either as to citizenship or districts. It must be construed consistently with the Act of 1887, and the broad language of the statute is limited by the constitution.

In Re Rugheimer, 36 F. R. 369.

Publication Act not Applicable.

But if we concede that the publication law permits non-residents of the district to be brought in when the suit is to enforce a legal or equitable claim against property within the district, we contend that this is not a case of that kind, and hence cannot be aided by that Act. The object of the suit at bar is not one to enforce a legal or equitable claim against property, but is one in which the bill is so framed that any decree therein is a decree in personam.

A suit for partition is not a proceeding in rem. It is not a suit to enforce a claim to or lien upon realty. The theory of the publication Act is that it entitles the court to proceed against the property, and it is conceded everywhere that it is not applicable to any proceeding which seeks a decree in personam.

"A suit for partition is sometimes spoken of as a proceeding in rem, but ordinarily it is not such a proceeding, for the process is not served upon the land, nor is the land a party defendant, nor is the final judgment binding on any of the cotenants who were not brought within the jurisdiction of the court by some service of process, actual or constructive."

Freeman on Cotenancy and Partition (2d Ed.) Sec. 463. and cases cited.

Where necessary parties to a suit in partition cannot be brought in because their citizenship is such as to prevent it, the

This is especially true where partition is alleged to be impossible and sale is sought of the entire tract, as in bill at bar.

Barney v. Baltimore City, cited above.

This is the general rule in all equity causes: every party who will be affected by the decree is a material party.

Bland v. Fleeman, 29 F. R. 669.

Detweiler v. Holderbaum, 42 F. R. 337.

Suit for partition in Florida is governed by the rules of courts of chancery.

McClellan's Digest Laws of Fla., p. 801. Sec. 1.

We quote the section entire:

"Suits or actions for partition or division of real estate may be instituted by bill or petition, in the Circuit courts of this State, in the County or circuit in which the lands to be divided, or which the subject matter of the suit may lie or be situated; and the proceedings in such suits or actions for partition shall be governed by the ordinary rules of proceedings in the courts of Chancery of this State, except as is herein otherwise provided."

The Act contains no provision changing the ordinary rule of courts of chancery that every party who will be affected by the decree is a necessary party. On the contrary, Section 2 makes it mandatory to join as defendants all parties in interest. It provides as follows:

"Such bill or petition may be filed by any one or more of several joint tenants, tenants in common, or coparceners, against their cotenants, coparceners or others interested in any lands to be divided, and such bill or petition shall set forth the description of the lands or premises of which partition is prayed by metes and bounds, or other sufficient description, and shall state, according to the best of the knowledge and belief of the petitioners, the names and places of residence of the several owners, joint tenants, tenants in common, or coparceners, or other persons interested in said lands or real estate, the quantity or proportionate share held or claimed by each, and such other matters (if any) as may be necessary to enable the court to adjudicate fully upon the rights and interests of parties."

When the bill was filed it was fatally defective on account of having joined a citizen of the District of Columbia, which on its face ousted jurisdiction. The order of publication and any other order made upon the bill thus presented was a nullity.

Mail Co. v. Flanders, 79 U. S. (12 Wall.) at page 135.

When defendants filed pleas and demurrers the complainant discovered that he had made a fatal mistake and has since been engaged in a frantic endeavor to avoid its effects. He first moved to amend the bill by alleging Eliza B. Anderson to be a citizen of South Carolina. (Page 41 of record). This notwithstanding it is capable of proof that she has for years been a citizen of the District of Columbia, and counsel for complainant admitted that he had no positive information to the contrary upon which to base his motion. At the time the motion was made, argument was in progress upon demurrers and pleas which had been set down by complainant. Defendants opposed the motion (page 42 of record) because improper practice, and made without notice and affidavit required by Equity Rule 29. The court, however, granted the motion.

We urge upon the court that the motion should have been denied, but its allowance cannot aid appellant. The plea of Isaac A. Stewart (page 38 of record) alleges that Eliza B. Anderson is a citizen of the District of Columbia. The allegation was not traversed by complainant, but the plea was set down for hearing (page 44 of record) and its allegations therefore stand admitted on the record, regardless of the statements of the proposed amendment.

Executor as Trustee.

After rehearing had been granted by court below the bill was again amended by striking out Eliza B. Anderson as a party. (Page 46 of record). This amendment was not before the court when the order of April 12, 1892, was made, dismissing the bill (page 44 of record), and was not proper to be urged on rehearing. It is therefore not before this court for consideration, and if considered by the court appellees ought not to bear any costs of this appeal inasmuch as the bill was fatally defective when originally dismissed. Counsel for defendants were not present at rehearing and the amendments were made without notice.

But did the amendment cure the defect? Appellant urges that Mrs. Anderson and the other devisees of Clinch are not necessary parties; that the Clinch executor is trustee under the will and takes the lands in trust, and that the devisees are not necessary parties. Equity rule 49 is cited, and the will of Clinch is filed. (Page 49 of record).

The will of Clinch clearly shows that this case does not come within the provisions of Equity Rule 49. There is a distinction between vesting an estate in executors by devise to sell, and in giving them a simple power to sell. It is the former class

of cases provided for in Equity Rule 49; it is the latter class to which this case belongs, as shown by the will.

The language of Rule 49 is plain: "In all suits concerning real estate which is *vested* in trustees *by devise* * * * * * * such trustees shall represent the person *beneficially interested* in the estate, &c."

This language unmistakably implies that the executor must take the legal title. The land must be *vested by devise*, and then the trustee represents—who? Not the holder of the legal title, —but the holder of the equitable title—the person *beneficially interested.*

An examination of the Clinch will discloses the fact that no portion of the Lowe Grant was "vested" in the Clinch executors "by devise." There are only two paragraphs in the will which can possibly be held to affect this Grant. The first is paragraph number one, in which he provides for the payment of his debts (page 49 of record); the second is the last paragraph of the fourth item (page 50 of record), wherein he devises to certain named persons all his property not theretofore mentioned and specifically bequeathed.

Nothing can be claimed in the Lowe Grant by the executors under this will except a mere power to sell, and that only for a certain specific purpose. This is not sufficient to vest any estate in the executors.

A devise that executors shall sell confers a mere naked power without interest.

Bogert v. Schauber, 7 Cow. 187.

A will directing the executors to sell testator's land and divide the proceeds does not require any estate in the executor and therefore none exists by implication, and until the sale the title and right of possession remain in the heirs at law, as tenants in common.

Hall v. Burr, 9 Johns. 104.

Cohea v. Jemison (Miss.), 10 So. Rep. 46 and cases cited.

Simmons v. Spratt (Fla.), 8 So. Rep. at p. 125 and cases cited.

NOTE.—No sale has ever been made of any part of the Lowe Grant by the Clinch executors.

In the case at bar the language of the will is: "I will and decree that my executors hereinafter named shall immediately after my death or as soon thereafter as may be practicable, to sell and dispose of so much of my lands in the State of Florida, as will pay all my just debts."

In Cohea v. Jemison the language was much stronger: "I will that all my remaining lands in Hinds county shall be sold by my executors upon such terms and upon such credit as in their discretion shall deem most advisable for the interests of all concerned in my estate."

Yet in that case the court says: "Clearly Cohea did not expressly devise the lands in controversy to his executors."

In Hull v. Burr, plaintiff contended that the real estate was not devised to the executors. That if the executors had a power to sell it had never been executed, and the real estate descended and remained in the heirs. The defendant contended that the executors took the real estate and that in any event they were entitled to the possession of the land under the will. The court agreed with plaintiff, saying: "The most that could be deduced from the will is that the executors had power to sell the land, and if this were so the land in the meantime and until the sale would descend to the heirs at law."

But we urge further: Even if item number one of this will be construed as a devise to the executors, it was a devise for a limited term of years, which has long since expired.

When an estate is expressly given it will be limited in duration to the trust to be performed, if a precise period can be shown.

Cohea v. Jemison (Miss.), 10 So. Rep. 46.

The utmost extent of time that can be claimed for any possible trust in the executors under the Clinch will, so far as the Lowe Grant is concerned, is ten years from the probate of the will. This limitation is found in that clause of the will appearing at the top of page 50 of the record, wherein Clinch, after the expiration of ten years, wills and devises all of his property of every description to certain named devisees, among whom is Mrs. Anderson. This clause and item number one, construed together, show that it was not intended to confer a perpetual trust upon the executors.

The power given the executors, as it affects the Lowe Grant, was simply a power to sell to pay debts. The will was probated over forty years ago. It is not to be presumed that creditors would so long remain passive, and the fact that none of this land has been resorted to for the payment of debts, lead irresistibly to these conclusions :

First, that no debts existed at the death of Clinch, and no trust therefore attached to this land.

Or, second, that if such debts existed they have been paid out of other lands in Florida, or in some other way, and therefore the trust has been satisfied.

Or, third, if such debts existed they are long since barred by limitation and cannot now be paid by the executor, and the trust has therefore expired.

In either event the executor has no present interest in the land, and the devisees are necessary parties to suits affecting it.

Creditors who have remained silent so long that their delay amounts to laches cannot compel a sale.

Crosby's Est. 55 Cal. 574.
McCrary v. Tasker, 41 Iowa 255.
McKean v. Vick, 108 Ill. 373.

In the case at bar there is a delay of over forty years.

The executors, therefore, not being trustees, have no such title as to be able to maintain or to defend suit for partition.

Freeman on Cotenancy & Partition, Sec. 471.
Whitlock v. Willard, 18 Fla. 156.
Greeley v. Hendricks, 23 Fla. 336.

The Clinch executor is shown to be a foreign executor, and a foreign executor cannot defend any suit in Florida.

Sloan v. Sloan, 21 Fla. 589.
Gordon v. Simonton, 12 Fla. 179.

There is nothing in the record to negative the presumption of a final settlement having been made by, and a discharge granted to, the Clinch executors. The clear intention of Clinch, as shown by the will, was that the estate should be fully settled at the expiration of ten years. It is no answer to say that this should be raised by plea. It only became material after complainant's amendment dismissing the Clinch devisees, and as this amendment was made after rehearing and without any notice to defendants, no opportunity has been given to plead to the amendments, and complainant should be required to clearly and affirmatively show that the estate is still unsettled.

Appellant's Authorities.

There is nothing in appellant's authorities which militates against our position. They all differ from the case at bar, and in none was the precise question presented that is here raised.

Chappadelaine v. Dechenaux, 4 Cranch 307, was a suit against an executor to enforce a purely personal indebtedness of the testator.

The same is true of Childress v. Emory, 8 Wheaton 669, which was a suit on a promissary note of the testator.

The only jurisdictional question decided in either case was that if the executors were citizens of different States, the United States courts have jurisdiction, although their *testators* might not have been entitled to sue, or liable to be sued in those courts. In the case at bar appellees have never contended that the citizenship of Duncan L. Clinch should be considered in determining jurisdiction.

Neither has it been claimed by appellees that the heirs are necessary parties defendant in a suit against an executor or administrator to enforce a purely *personal indebtedness* of the testator. In such a case the executor or administrator is sufficient. In the words of the court in Childress v. Emory, above cited, "no other persons are the representatives of the *personalty*."

Osborn v. Bank of United States, 9 Wheaton 738, was a bill for an injunction by the United States Bank against the auditor and other officers of the State of Ohio to enjoin the collection of a tax levied on the Bank under the laws of the State. It was contended that the State of Ohio ought to have been made defendant instead of its officers. The court held that the State was not an indispensable party and that the suit might proceed against its agents who were threatening the wrong.

This case simply decides that parties not indispensable may be omitted (and appellees have never contended otherwise), but does not sustain the position that the Clinch devisees can be omitted in the case at bar.

At page 856 of the opinion, the court, as an illustration, refers to the position occupied by executors and administrators as representatives of creditors and legatees and says: "It has never been suspected that, if the executor be a resident of another State, the jurisdiction of the federal courts could be ousted by the fact that the creditors or legatees were citizens of the same State with the opposite party." The court must be understood as having reference only to cases in which suit could properly be brought against executors or administrators. It is evident that he had in mind only their position as representatives of the personalty. "*Creditors*" and "*legatees*" are the words used by the court, the word *devisees* being carefully omitted.

Again: It never could have been understood from this or any previous case, that the executors in all cases represent the

estate and that heirs and devisees could be dispensed with in actions affecting real estate. Had it been so understood, Equity Rule 49 would have been unnecessary.

Osborn v. Bank of United States was decided in 1824. Equity Rule 47 was not made until 1839, and therefore Rule 49 was not made until several years subsequent to the Osborn case.

Shields v. Barrow, 17 How. 129; 15 L. Ed. at p. 161.

If when lands are specifically devised to executors a rule of court is necessary to enable those beneficially interested to be dispensed with in suits affecting such lands, it follows that prior to the rule the heirs and devisees could not have been dispensed with in any case affecting the real estate, because in no case could their interest in the land be more remote than in the one covered by the rule. Rule 49 is therefore only a partial relaxation of the rule requiring the presence before the court of all parties interested, and cannot be extended to cases not clearly within its terms.

In Shields v. Barrow, above cited, it is said (L. Ed. p. 161) that the Act of 1839 is only affirmative of the rule established in Osborn v. Bank of United States, and does not affect any case where persons having an interest are not joined because their citizenship is such that their joinder would defeat the juisdiction.

In the case at bar it is specifically alleged in the amendment that the Clinch devisees are stricken out "in order that this court may without doubt retain jurisdiction of this cause."

It is further said in Shields v. Barrow (page 160 L. Ed.) that neither Rule 47 nor the Act of 1839 "enables a Circuit court to make a decree in equity, in the absence of an indispensable party, whose rights must necessarily be affected by the decree." The Act of 1839 is only an affirmance of the rule in Osborn v. Bank of United States.

It is settled beyond all question by Anderson v. Watt, 138 U. S. 694; L. Ed. 1078, that necessary parties cannot be dispensed with to give jurisdiction, and if Osborn v. Bank of United States is to be understood as holding otherwise, it has been overruled.

To summarize our position upon this point, we contend:

(1.) That Mrs. Anderson is a necessary party; that her citizenship in the District of Columbia is admitted in the record, and that she cannot be dismissed to give the court jurisdiction.

(2.) That even if the amendments made at rehearing and the Clinch will can be considered by the court, the only authority given the executors over the Lowe Grant by the will was a power to sell if necessary to pay debts, and therefore the case does not come within Rule 49.

(3.) That if it be conceded that the executors were trustees and the Lowe Grant affected by the trust, yet such trust was only upon the condition that there were debts to be paid, which has not been shown, and was for a limited period, which has long since expired.

(4.) That even if the will shows an unlimited trust, there is nothing in the record to overcome the presumption, arising from the long lapse of time, that the object of the trust has been fully satisfied and the executor discharged.

Before leaving this question of jurisdiction as affected by residence and citizenship of the parties we wish to call it to the attention of the court that no reason is disclosed for dismissing from the bill the unknown heirs of the McRaes, as was done by complainant by the amendments made at the rehearing. (Page 46 of record.) The main object of the bill being for a sale of the land, they are necessary parties under all the authorities, and are not represented by any parties to the suit.

In Anderson v. Watt, above cited, and in Robert v. Lewis, 36 L. Ed. 467, decided April 25, 1892, it is said that where jurisdiction depends upon citizenship this citizenship of the parties must be clearly alleged and must appear of record. This rule was fatal to the bill as originally filed, and the "unknown heirs" were therefore dismissed, "in order that the court might without doubt retain jurisdiction."

We urge that they are necessary parties, that the attempt to remove them from the record is futile, and that the bill must be dismissed because their citizenship does not appear.

IV

Adverse Titles.

In another place we have directed the attention of the court to the conflicting and adverse interests and titles that appear upon the face of this bill. The right of a court of equity to proceed when adverse and conflicting titles appear upon the face of a bill for partition was fairly raised in the court below, by numerous demurrers (see demurrer of Arthur G. Hamlin, page 58 of record, paragraph 5, and demurrer of Thomas J.

Smith, page 61 of record, paragraph 10), and is properly before this court for consideration. This question is not alluded to in the decree of the lower court from which this appeal is taken, but it is believed that if this court considers, from the whole record, that the decree of the court below should be affirmed it will so declare, and in finding reasons therefor will not be confined to those assigned by the court below.

We shall therefore urge that the character of this bill is such that it cannot be entertained by a court of equity, and was properly dismissed.

The parties to a suit in partition must be tenants in common of all the land sought to be divided. If some of them have an interest in a part only of the land, a decree in partition will not be valid.

5 Wait's Act. & Def. p. 94.
Jackson v. Myers, 14 Johns. 354.
Marmaduke v. Tennant, 4 B. Mon. 210.
Harmon v. Kelley, 14 Ohio, 502; 45 Am. Dec. 552.
Wickusham v. Young, 1 Miles (Pa.) 395.
Matter of Prentiss, 7 Ohio, pt. 2, 129.
Ramsay v. Bell, 42 Am. Dec. 163.
Brownell v. Bradley, 42 Am. Dec. 498.

Such is the interest of the Clinches in the entire south half of the grant, and such the interest of Henderson Williams in the ten acres of which the bill alleges he is in possession. The bill admits the Clinch claim to the south quarter of the grant (page 47 of record), while the Williams claim is neither attacked or denied. (Page 26 of record.)

A suit in partition to try legal titles cannot be maintained.

Chapin v. Sears, 18 F. R. 814.
Beebee v. R. R. Co. 39 F. R. 481.
Doe v. Carpenter, 18 How. 297; 15 L. Ed. 389.
Rich v. Bray, 37 F. R. 273.
Mattair v. Payne, 15 Fla. 682.
Matthews v. Lindsay, 20 Fla. 962.
Freeman Cot. & Part. Sec. 502.

This is especially true where the cotenants are at issue between themselves. In such a case it is proper to dismiss the bill.

Buckmaster v. Kelley, 15 Fla. at pp. 199-209
McDonell v. Eaton, 18 F. R. 710.

In the case at bar the McRaes and those under them are interested with Greeley in establishing the grant from Spain to Lowe, and the heirship of the Lowes, and the ganancial rights of the wife of Lowe, under whom they claim. They are against Greeley and some of the defendants in opposing the extent of appellant's title, since both claim to possess the interest of Mrs. Lowe, one by deed from her, the other under the heirs, who deny that she parted with title.

The bill sets up and attacks the title of numerous parties defendant who it alleges are not legally cotenants because of various defects in their titles set forth, and as the bill is framed it was properly dismissed, since no issue therein could be tried without affecting the interests of all parties thereto.

To create a separate interest there must exist a separate and distinct cause of action on which a separate and distinct suit might have been brought and complete relief afforded, independent of the other defendants and not affecting their interests.

Graves v. Corbin, 132 U. S. 571; 33 L. Ed. 462.
Fraser v. Jemison, 106 U. S. 191; 27 L. Ed. 131.
Ayer v. Wiswall, 112 U. S. 187; 28 L. Ed. 693.
Foster's Fed. Prac. Sec. 384.

Multifarious bills and those lacking proper parties will be dismissed.

McDonnell v. Eaton, 18 F. R. 710.
Doe v. Carpenter, 18 How. 297; 15 L. Ed. 389.

Those only who have a clear legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud upon title. On this point alone the bill was properly dismissed.

Orton v. Smith, 18 How. 263; 15 L. Ed. 393.

We do not forget that among the amendments sought to be made at the rehearing is one which seems to be aimed at this defect in the bill. At page 48 of record, second paragraph from bottom, complainant says: "And they pray not to quiet title except in so far as the granting of partition, and the denial of right in severalty binds and should bind all the parties who are before the court, and sets off in severalty the property before the court and precludes repartition of the same property or any part thereof between the same parties."

This is begging the whole question. The bill remains with all its warring and adverse interests appearing upon its face, showing the impossibility of rendering any decree which will not adjudicate and settle all titles and claims, legal and equitable; but forsooth a court of equity is to retain jurisdiction by the simple process of praying that legal titles be quieted only so far as may be *necessary!* The allegation that partition cannot be made and that the land must therefore be sold, remains unchanged. No sale can be made until titles are all adjudicated and quieted.

It was argued in the court below, by appellant, that the Florida Partition Act (McClellan's Digest, page 801), and Chapter 3884 of the Florida Acts of 1889, add to the powers of chancery courts to try legal titles in suits for partition.

While the general equity powers of United States courts may possibly be held enlarged by the Florida Partition Act, above cited, and by Chapter 3884, which provides for removing clouds from title in certain cases, yet neither statute authorizes joinder of both proceedings in one bill.

Beebee v. R. R. Co., 39 F. R. 481.
Chapin v. Sears, 18 F. R. 814.

If the United States courts consider these statutes, they will consider them in connection with the decisions of the State courts construing them. This is so well settled that we simply cite:

Green v. Neal, 6 Pet. 291; 8 L. Ed. 402.
Jackson v. Chew, 12 Wheat. 153; 6 L. Ed. 583.

The Florida Partition Act has been construed by the Supreme court of the State in Mattair v. Payne, 15 Fla. 682.

In that case the bill was very similar to the one at bar. It sought to recover for use and occupation; to set aside and cancel deeds and mortgages; to procure a sale of the premises by commissioners, and to distribute proceeds of the sale. The court said that these matters could not be adjusted in one suit in law or equity. "Treated as a suit in partition, it cannot be maintained with these parties and with the legal interests involved in such conflict as here presented, and with the adverse possesion of these defendants as against plaintiff collectively, as they appear from the bill of complaint." In concluding the opinion the court says: "There seems to be no better way to put these parties in their proper position to assert their legal and equitable remedies and disentangle them from the labyrinth of

confusion in which they appear to be involved, than to dismiss the whole proceeding. This is sanctioned by Story's Eq. Pleadings, Section 271, and cases cited, whether the bill be demurred to or not."

In Street v. Benner, 20 Fla. 700, the statute was again before the court. A careful reading of page 706 shows that no adverse title or interest was set up by the bill. Mary S. Benner and other defendants were named and their interests alleged as unknown. The court says at the bottom of page 706, "such statements show that the complainant and defendants are tenants in common and parties interested in the lands sought to be divided, and presents a proper case for proceedings in partition under the statute."

That the bill in the Street case was wholly for partition and did not set up adverse titles, appears at the bottom of page 711.

In speaking of Mattair v. Payne, the court said: "It was said that equity was not the proper forum for trying the legal title to land and that a decree of partition could not be had until the legal title was established. The bill itself showed the absence of complainant's right. This was entirely correct according to all authorities, whether the proceeding were at law or in equity. The very nature of this proceeding contemplates a division of land among *owners* in common. Where the object of the suit is to try a question of legal title, the proper forum is a court of law."

At the bottom of page 712, the court further points out that the case of Mattair v. Payne was decided wholly upon the bill, and the Street case everywhere approves of that decision. The court then says: "As the bill in this (Street) case was doubtless dismissed because of issues respecting the legal titles admitted to be tendered by *plea and answer*, it is proper to examine the statute with reference to the jurisdiction of the court of chancery in suits brought for the purpose of partition of lands." The opinion then goes on to hold that in such case the statute of Florida of 1844 is broad enough to allow a court of equity to determine a question of adverse title raised by plea or answer.

That this is the scope of the decision is shown beyond question by the third headnote to the case, which is as follows (the italics are ours): "A court of equity is not the proper tribunal for trying the legal titles to lands; but by the statutes of this State regulating proceedings in partition, *where the bill shows the court has jurisdiction*, and the complainant's title is put in issue *by the defendant's pleadings*, the court is authorized to 'ascertain and adjudicate the rights and interests of the parties,' and de-

cree a partition 'if it shall appear that the parties are entitled to the same,' without requiring the legal title to be first tried in a court of law."

In Florida, by statute, the headnotes of all decisions are required to be prepared by the judges.

"The Judges of the Supreme court of this State shall, in deciding cases, prepare and make a syllabus or statement of the points and principles intended to be decided by the court, which shall be published in the reports in lieu of that usually prepared by the reporter."

McClellan's Dig., p. 345, Sec. 21.

This statute was in force when the Street case was decided.

In Matthews v. Lindsley, 20 Fla. 962, suit was brought to foreclose a mortgage. The complainant owned by title other than his mortgage some of the property covered by the mortgage and to that extent was cotenant with defendant. The defendant filed cross bill alleging that the mortgage had been paid, that it was a cloud upon his title, and prayed that the mortgage might be cancelled and the property partitioned. The court held that partition cannot be maintained on bill (or cross bill) which upon its face sets up any issue as to the legal title, saying: "The cross bill seeks to put in issue and establish his (Harris') legal title. This must in all such cases be established or unquestioned before partition can be had."

There is nothing in Keil v. West, 21 Fla. 508, that is not in harmony with these cases. In that case no adverse title was shown by the bill. It alleges that complainant and defendants are each seized as tenants in common and that their mother "claims to have some interest therein and to be in possession of the premises," and that she "refuses to set forth her interest or join in partition." The court says: "If she had an interest unknown to the complainants she had an opportunity to make it known; and upon its being set up the court could have adjudicated it, or sent the question to a court of law, if it had been such as a court of equity cannot dispose of under the statute. It might have been that she had even an undivided interest by conveyance from one of the sisters, and that it was unknown to complainants. The bill does *not* allege that Mrs. Keil is in possession. * * * * * All it admits is that she claims to be in possession. * * * * * * It does not admit that she claims any interest adverse to their right of partition. We do not say that a bill which shows that a defendant is in possession of the premises claiming them adversely to complainants would not oust the equitable jurisdiction; no such case is before us, and in its absence we say nothing."

At page 525 the court quotes approvingly the third head-note of Street v. Benner, and nowhere holds that the court would have jurisdiction if the adverse title appeared upon the face of the bill.

Such is the construction of the Florida statute on partition, and it is thus seen that the decisions are uniform in Florida in holding that a bill for partition showing adverse and conflicting titles upon its face is bad and cannot be entertained; but when the bill is sufficient to give the court jurisdiction, legal titles may be called in question by the pleadings of defendant and will be adjudicated by the court.

It is perfectly evident upon the face of the bill in the Lowe Grant case that the title to the property is again and again put in issue, and under the decisions to which we have just referred it should be dismissed upon this ground alone.

It is established by the decisions that United States courts are bound by State decisions construing local statutes, and it is therefore unnecessary to review the cases cited by complainant in the lower court. In so far as they may differ from the Florida courts they must yield.

Polk v. Wendal, 9 Cranch, 87, 3 L. Ed. at p. 669.

It was argued below that Chapter 3884 of the Laws of Florida, enacted in 1889, enlarged the jurisdiction of the State courts, regarding the question of partition.

There has been no construction of this statute by the Supreme court of the State, and hence there is nothing to guide the court. It has been held in the Fourth, Fifth and Seventh circuits of the State that the Act is unconstitutional in that it grants to courts of equity jurisdiction of matters properly cognizable at law only, and deprives parties of the constitutional right of a jury trial. It has also been repeatedly held in the State circuits that the Act was not intended to enlarge or change Statutes governing special subjects, such as partition. The Act governing partition is complete in itself and prescribes certain methods of procedure. The cases citied by us elsewhere establish the proposition that special Statutes are unaffected by general statutes which do not purport to repeal such special statutes, or alter them in any particular.

Chapter 3884 is intended for no other purpose than to quiet titles and award possession to real estate. As we have seen, prior to this Act it was uniformly held by Florida courts that an action for partition and to remove cloud from title could not be joined in one suit, and there is nothing in this Act which permits it. A mere enlargement of equity jurisdiction does not authorize the filing of multifarious bills.

In Beebee v. R. R. Co. 39 F. R. 481, the court had under consideration a Mississippi statue which provided that in a suit *for partition* the legal title to the property may be tried. The statute is very broad in authorizing legal titles to be tried *in a partition suit* and in that respect is much stronger than any Florida statute. The court held in that case that the Mississippi statute does not authorize a tenant in common to make defendants to his suit for partition persons claiming adversely to all tenants in common.

Chapin v. Sears, 18 F. R. 814, is even more conclusive of our position. The statute of New Jersey therein discussed is almost identical with Chapter 3884. A bill was brought for partition in that State in the Federal court, and the argument was that this statute enlarged the jurisdiction so as to allow both partition and the trying of the legal title in one bill. The court held that the Act providing for the settlement of legal titles added nothing to the partition law, and that the joinder of the two objects in one bill would make the bill fatally multifarious.

These decisions cannot be successfully met and settle the law.

V

Dower.

We feel sure that the decree of the lower court dismissing the bill for want of jurisdiction must be sustained, and we will not increase the labors of the court by entering into any discussion of the question whether the wives of cotenants are proper parties in a suit for partition. The authorities are reviewed by Mr. Freeman in his work on Cotenancy and Partition, Sec. 474. It will be found that the cases are conflicting, but the great weight of authority sustains the proposition that they are not proper parties.

17 Am. & Eng. Ency. of Law, p. 721.

We also cite 17 Am. & Eng. Ency. of Law, p. 719, on the proposition that the heirs and devisees of a deceased cotenant are necessary parties defendant in a suit for partition.

VI

Conclusion.

We have endeavored to fairly present to the court the facts of this case and the law governing it. We have no fears in submit-

ting to the intelligence of the court the question whether the cases relied upon by us have been "limited, overruled or criticised." Many of them are the latest utterances of the highest court in the land upon the questions involved. We have too much esteem for the eminent jurists who have, from the Supreme Bench of the nation, handed down the decisions which must determine this case, to lightly brush aside their opinions as influenced by "State Sovereignty," national unity, or any other motive except a conscientious sense of their duty to declare the law. We have made no claim to infallibility, but our views of the law of the case have undergone no change since the beginning. If we have seemed to ramble at times, it has been caused by our efforts to follow counsel for appellant as he has wandered around in a vain endeavor to find something solid upon which to stand. Light has broken upon him during the progress of the case, and he will never again make the fatal mistake which, by his efforts to get rid of Mrs. Anderson, he admits he has made.

We confidently submit that the following propositions are established by the authorities as the law of this case.

1. Federal courts cannot entertain jurisdiction of such controversies as the case at bar between citizens of the same State.

2. That the citizenship of all parties must be alleged in the bill or appear of record.

3. That when the court has jurisdiction by reason of the requisite citizenship, the suit must be brought in the district of the residence of either the plaintiff or defendant.

4. That the Act of 1875 does not change this rule.

5. That this is not a proceeding in rem, and not within the scope of the Act of 1875.

6. That United States courts have no jurisdiction of suits between citizens of a State and a citizen of the District of Columbia.

7. That all parties interested are necessary parties, especially under Florida statutes, and heirs and devisees are such parties.

8. That necessary parties cannot be dispensed with to give the court jurisdiction.

9. That the only exception in United States courts to the rule that heirs and devisees are necessary parties in suits affecting land is when the land is *vested* in the executors by *devise*.

10. That a power given to an executor to sell does not make him a trustee.

11. That each cotenant must be interested in every part of the land sought to be partitioned.

12. That partition contemplates the division of land among *owners* in common, and equity has no jurisdiction where the bill shows adverse and conflicting titles *upon its face.*

13. That the wives of cotenants are not proper parties in suit for partition.

We respectfully submit that the decree of the lower court dismissing the bill must be affirmed.

Respectfully,

ARTHUR G. HAMLIN,
ISAAC A. STEWART,
E. K. FOSTER,
EGFORD BLY.

DeLand, Fla., Dec. 10, 1892.

155 U.S. 76
U.S. v. Coe.

Transcript & Papers
not yet supplied:
Case remains in Court.

See 170 U.S. 681:
Case still remaining
in Court
after that.